(24,010)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 332.

MOUNTAIN TIMBER COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF WASHINGTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

INDEX.

Judd & Detweiler (Inc.), Printers, Washington, D. C., October 20, 1914.

a MOUNTAIN TIMBER COMPANY, Plaintiff in Error,
v.
STATE OF WASHINGTON, Defendant in Error.

Appeal from the Supreme Court of the State of Washington to the Supreme Court of the United States.

[Seal of the Supreme Court, State of Washington.]

b In the Superior Court of the State of Washington in and for the County of Cowlitz.

STATE OF WASHINGTON, Plaintiff,
v.
MOUNTAIN TIMBER COMPANY, a Corporation, Defendant.

Precipe.

To the clerk of the above-entitled court:

Please prepare, certify and file, Transcript for use on appeal in this cause containing complaint, motion against complaint, order denying motion against complaint, demurrer to complaint, order overruling demurrer to complaint, notice of election to stand on demurrer, judgment, notice of appeal and proof of service thereof, bond on appeal and proof of service, and this precipe.

E. C. STRODE,
A. H. IMUS &
COY BURNETT,
Attorneys for Appellant.

Endorsements upon the back of the precipe are as follows: 2849. In the Superior Court of Washington for the County of Cowlitz, State of Washington, Plaintiff, vs. Mountain Timber Co. Defendant, Precipe. Filed Nov. 16, 1912, (Signed) Homer Kirby, Clerk, by ——— ———, Deputy. Offices of Abel & Burnett, Attorneys, 1103-4-5 Yeon Building, Portland, Oregon.

1 In the Superior Court of the State of Washington in and for the County of Cowlitz.

STATE OF WASHINGTON, Plaintiff,
v.
MOUNTAIN TIMBER COMPANY, a Corporation, Defendant.

Transcript on Appeal to the Supreme Court of the State of Washington.

Be it remembered, that in the Superior Court of the State of Washington, in and for the County of Cowlitz, in an action wherein the

State of Washington is plaintiff and Mountain Timber Company, a corporation, is defendant, Number 2849, the following proceedings were had and done, viz., on the 21st day of February, 1912, a Complaint was filed in the office of the Clerk of said Court in said cause in words and figures as follows, to wit:

"In the Superior Court of the State of Washington for Cowlitz County.

No. —.

THE STATE OF WASHINGTON, Plaintiff,

v.

MOUNTAIN TIMBER COMPANY, a Corporation, Defendant.

Complaint.

Plaintiff, for cause of action against the defendant alleges:

I.

That at all times herein mentioned defendant was and now is a corporation engaged in the transaction of business in the state of Washington and thereunto duly authorized, having an office and transacting business at Kalama, Cowlitz County, Washington.

II.

That during all the times herein mentioned, the defendant
2 was engaged in the business of operating a saw mill, using power-driven machinery therein, engaged in the business of logging timber, and engaged in the business of constructing and operating a logging railroad, all in Cowlitz county, Washington.

III.

That the estimated payroll of the workmen employed by the defendant in and about its said saw mill, and in its said business of logging, in the extra hazardous employments and departments thereof, for the three months beginning October 1, 1911, as determined from the payroll of the last preceding three months of operation thereof prior to said date, is the sum of thirty-six thousand, six hundred ninety-five and 77/100 Dollars ($36,695.77), and that under chapter 74 of the Laws of 1911 there is payable to the State of Washington a premium of two and one-half per cent of said sum, amounting to the sum of nine hundred seventeen and 39/100 dollars, ($917.39); that the estimated payroll of the workmen employed by the defendant in the construction and operation of its said logging railroad in the extra hazardous employments and departments of the same for the three months beginning October 1, 1911, as determined from the payroll for the last preceding three months of the operation thereof prior to said date, is the sum of Two thousand, six hundred thirty-four and 93/100 dollars, ($2,634.93),

and that, under chapter 74 of the Laws of 1911, there is payable to the State of Washington a premium of five per cent of said sum, amounting to the sum of one hundred thirty-one and 75/100 dollars; that the total amount payable from the defendant to the state of Washington as a premium on the payrolls of its workmen is the sum of one thousand forty-nine and 14/100 dollars ($1,049.14).

IV.

The demand therefor has been made, but that the defendant has refused and still refuses to pay the same.

3 Wherefore, plaintiff prays judgment against the defendant in the sum of one thousand forty-nine and 14/100 dollars (1,049.14), together with interest thereon from October 1, 1911, until paid; for its costs and disbursements herein: and for such other and further relief as to the court may seem proper herein.

(Signed) W. V. TANNER,
Attorney General;

(Signed) S. H. KELLERAN,
Assistant Attorney General,
Attorneys for Plaintiff.

STATE OF WASHINGTON,
County of Thurston, ss:

C. A. Pratt, being first duly sworn, says, that he is a duly appointed, qualified and acting member of the industrial insurance department of the state of Washington; that he has read the above and foregoing complaint, knows the contents thereof, and believes the same to be true.

(Signed) C. A. PRATT.

Subscribed and sworn to before me this 29th day of January, 1912.

(Signed) F. W. HINSDALE,
Notary Public in and for the State of Washington, Residing at Tacoma.

4 Endorsements on the back of the complaint are as follows: No. 2849; In the Superior Court of the State of Washington for Cowlitz County. The State of Washington, Plaintiff, v. Mountain Timber Co., a corporation, Defendant. Complaint. Filed Feb. 21, 1912. (Sgd.) Homer Kirby, Clerk, by —— ——, Deputy.

That on the 22nd day of April, 1912, a Motion was filed in the office of the Clerk of said Court, in the said cause, in words and figures as follows, to-wit:

In the Superior Court of the State of Washington, Cowlitz County.

STATE OF WASHINGTON, Plaintiff,
v.
MOUNTAIN TIMBER COMPANY, a Corporation, Defendant.

Motion.

The defendant moves the court to require the plaintiff to make its complaint herein more definite and certain by setting out

(1) What employments or what departments are meant or included in the words, "In the extra hazardous employments and departments," in the third (3d) line of paragraph three (3).

(2) By setting out what employments or departments are meant or included in the words, "In the extra hazardous employments and departments," in the fourth (4th) and fifth (5th) lines on page second of said complaint.

(Signed) E. C. STRODE,
A. H. IMUS &
COY BURNETT,
Attorneys for Defendant.

5 Service accepted by receipt of copy admitted this 18th day of April, 1912.

(Signed) W. V. TANNER,
S. H. KELLERAN,
Attorneys for Plaintiff.

Endorsements on the back of the Motion are as follows: Original, No. 2849. Superior Court, Washington, Cowlitz County. State of Washington, Plaintiff v. Mountain Timber Company, Defendant. Motion. Filed Apr. 22, 1912. (Sgd.) Homer Kirby, Clerk, By —— ——, Deputy. Offices of Abel & Burnett, Attorneys, 1103-4-5 Yeon Building, Portland, Oregon.

That upon the 3d day of June, 1912, an Order was duly made in said Court and filed in the office of said Clerk, in said cause, in words and figures as follows:

In the Superior Court of the State of Washington for Cowlitz County.

No. —.

STATE OF WASHINGTON, Plaintiff,
v.
MOUNTAIN TIMBER COMPANY, a Corporation, Defendant.

Order.

This cause having come on to be heard on the 6th day of May, 1912, in the above court, before the Hon. H. E. McKenney, judge

thereof, upon the motion of the defendant to require the plaintiff to make its complaint more definite and certain, the parties being represented by attorneys, and the court having heard arguments in support of and in opposition to the motion, and having taken the same under consideration, and being now fully and sufficiently advised in the premises, does order that the defendant's motion to require the plaintiff to make its complaint more definite and certain be and the same is hereby denied.

It is further ordered that the defendants have ten days from the date hereof within which to further plead.

To all of which defendant excepts and the exception is allowed.

Done in open court this 3rd day of June, 1912.

(Signed) H. E. McKENNEY, *Judge.*

Endorsements on the back of the order are as follows: Compared. No. 2849. In the Superior Court of the State of Washington for Cowlitz County. State of Washington, Plaintiff, v. Mountain Timber Company, a corporation, Defendant. Order. Filed June 3, 1912. (Signed) Homer Kirby, Clerk, by —— ——. Recorded in Vol. 9, Page No. 344.

That on the 12th day of June, 1912, a Demurrer was filed in the office of the Clerk of said Court, in said cause, in words and figures as follows:

In the Superior Court of the State of Washington for Cowlitz County.

STATE OF WASHINGTON, Plaintiff,
v.
MOUNTAIN TIMBER COMPANY, Defendant.

Demurrer.

The defendant demurs to the complaint of plaintiff herein for the reason:

7

1.

That the complaint does not state facts sufficient to constitute a cause of action.

2.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes Section 4 of Article 4 of the Constitution of the United States.

3.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes the fourth amendment of the Constitution of the United States by authorizing unreasonable searches and seizures and violates the right of persons to be secure in their persons, houses, papers and effects.

4.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes the fifth amendment to the Constitution of the United States by depriving defendant of its property without due process of law and takes defendant's private property without just compensation.

5.

For the reason that Chapter 74 of the laws of the State of Washington is unconstitutional and void in that it is contrary to and infringes the 7th amendment of the Constitution of the United States by fixing a liability upon defendant without trial by jury.

6.

For the reason that Chapter 74 of the laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes the 14th amendment to the Constitution of the United States by abridging privileges and immunities of
8 defendant, and by depriving defendant of its liberty and property without due process of law, and denies to defendant the equal protection of the law.

7.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes Section 3 of Article 1 of the Constitution of the State of Washington by depriving defendant of its liberty and property without due process of law.

8.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary and infringes Section 7 of Article 1 of the Constitution of the State of Washington because it disturbs defendant in its private affairs, without authority of law.

9.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes Sec. 12 of Article 1 of the constitution of the State of Washington because it grants to a class of citizens privileges and immunities which are not upon the same terms or at all granted to another citizen.

10.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary and infringes Section 16 of Article 1 of the Constitution of the State of Washington by taking private property for private use

and taking private property without just compensation having been first made or paid to the court.

9

11.

For the reason that Chapter 74 of the Laws of 1911 of the State of Woshington is unconstitutional and void in that it is contrary to and infringes Section 21 of Article 1 of the Constitution of the State of Washington by depriving defendant of the right of trial by jury.

12.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to, violates and infringes Sec. 19 of Article 2 of the Constitution of the State of Washington because it embraces more than one subject, and subjects that are not expressed in its title.

13.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it violates subdivision 5 of Section 28 of Article 2 of the Constitution of the State of Washington, in that it is a special law for the assessment and collection of taxes.

14.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes subdivision 17 of Section 28 of Article 2 of the Constitution of the State of Washington by providing a special law for limitation of civil and criminal actions.

15.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes Section 1 of Article 4 of the Constitution of the State of Washington by vesting judicial power in the Insurance Commission in the Industrial Insurance Department.

10

16.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes Sec. 1 of Article 7 of the Constitution of the State of Washington by taxing property without regard to its value.

17.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes Section 2 of Article 7 of the Constitution of the State of Washington by providing a means of taxation not according to uniform and equal rates and not for a public purpose.

18.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes Section 5 of Article 7 of the Constitution of the State of Washington by attempting to levy a tax not in pursuance of law.

19.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes Section 1 of Article 8 of the Constitution of the State of Washington by creating a debt against the state in excess of $400,000.

20.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes Section 5 of Article 8 of the Constitution of the State of Washington in that the credit of the state is given to and loaned in aid of private individuals and associations of individuals.

(Signed) E. C. STRODE,
A. H. IMUS &
COY BURNETT,
Attorneys for Defendant.

11 STATE OF WASHINGTON,
County of Thurston, ss:

Service of the foregoing demurrer accepted by receipt of copy admitted this — day of June, 1912.

—— ——,
Attorney for Plaintiff.

Copy of the within demurrer received at Olympia, Wash., this 10th day of June, 1912.

(Signed) W. V. TANNER,
Attorney General;

(Signed) S. H. KELLERAN,
Assistant Attorney General,
Attorneys for Plaintiff.

Endorsements upon the back of the Demurrer are as follows: 2849. Superior Court, Washington, Cowlitz County. State of Washington, Plaintiff v. Mountain Timber Company, Defendant, Demurrer. Filed June 12, 1912. (Signed) Homer Kirby, Clerk, By —— ——, Deputy. Offices of E. C. Strode, A. H. Imus & Coy Burnett, Att'ys for defendant.

That upon the first day of July, 1912, an order was duly made and entered in said case in words and figures as follows:

In the Superior Court of the State of Washington for Cowlitz County.

No. —.

STATE OF WASHINGTON, Plaintiff,

v.

MOUNTAIN TIMBER COMPANY, a Corporation, Defendant.

Order.

12 This matter coming on regularly this day upon the demurrer of the defendant to the Complaint of the plaintiff herein, the plaintiff appearing by W. V. Tanner, Attorney General, its Attorney, and the defendant appearing by Messrs. A. H. Imus and Coy Burnett, its attorneys, and said matter having been finally submitted to the Court, the Court having fully considered the same and being now fully advised in the premises, it is ordered that the said demurrer be and the same is hereby overruled.

It is further ordered that the defendant have until July 25th, 1912 in which to file and serve its answer herein.

To this order the defendant excepts and its exception is allowed.

Done in open Court this 1st day of July, 1912.

(Signed) H. E. McKENNEY, *Judge.*

Endorsements upon the back of which order are as follows: Compared. No. 2849. In the Superior court of Cowlitz County, State of Washington. State of Washington, Plaintiff, vs. Mountain Timber Company, a corporation, Defendant. Order. Filed this 1 Day of July, 1912. (Signed) Homer Kirby, Clerk. A. H. Imus, Coy Burnett, Attorney- for defendant, P. O. Address, Kalama, Wash. Recorded in Vol. 9 page 355.

Then upon the 27th day of July, 1912, there was filed in the office of the clerk of said court in said cause, a Notice in words and figures as follows, towit:

13 In the Superior Court of Washington for the County of Cowlitz.

STATE OF WASHINGTON, Plaintiff,

v.

MOUNTAIN TIMBER COMPANY, a Corporation, Defendant.

Notice.

Notice is hereby given that the defendant hereby elects to stand upon its demurrer to the complaint herein and its exceptions taken to the overruling thereof, and elects not to further plead.

Dated this 24th day of July, 1912.

(Signed) E. C. STRODE,
A. H. IMUS &
COY BURNETT,
Attorneys for Mountain Timber Co.

STATE OF WASHINGTON,
County of Cowlitz:

Service admitted by receipt of copy this 25th day of July, 1912.
(Signed) W. V. TANNER,
Attorney for State of Washington.

14 Endorsements upon the back of which notice are as follows: 2849. In the Superior Court of the State of Washington for Cowlitz County. State of Washington, Plaintiff, v. Mountain Timber Company, Defendant. Notice. Filed July 27, 1912. (Signed) Homer Kirby, Clerk, by —— ——, Deputy. E. C. Strode, A. H. Imus & Coy Burnett, Attorneys for Deft.

That upon the 20th day of August, 1912, a Judgment was entered and filed in the office of the Clerk of said Court in said cause, in words and figures as follows to wit:

In the Superior Court of the State of Washington for Cowlitz County.

No. —.

STATE OF WASHINGTON, Plaintiff,
v.
MOUNTAIN TIMBER COMPANY, a Corporation, Defendant.

Judgment.

This matter having come on regularly to be heard upon the demurrer of the defendant to the complaint of the plaintiff herein, the plaintiff appearing by W. V. Tanner, Attorney General, and S. H. Kelleran, Assistant Attorney General, its attorneys, and the defendants appearing by E. C. Strode, A. H. Imus and Coy Burnett, its attorneys, and said demurrer having been submitted to the court, and having been by the court overruled and defendant there-
15 upon having been given until the 25th of July, 1912, in which to further plead, and said time having elapsed and no further pleading upon the part of the defendant having been received, and the defendant having served upon the plaintiff its notice of election to stand upon its said demurrer, and its exceptions to the overruling thereof, and of its election not to plead further; now upon motion of the plaintiff, the court being fully and sufficiently advised in the premises, and having duly considered the matter, does,

Order adjudge and decree that the plaintiff have and recover of and from the defendant the premium or contribution payable to the State of Washington under chapter 74 of the Laws of 1911, upon the estimated payroll of the workmen employed by the defendant for the three months beginning October 11, 1911, to wit, the sum of One thousand forty-nine and 14/100 ($1,049.14) Dollars; and further have and recover of and from said defendant interest upon said sum at the legal rate from October 1, 1911, to wit: the sum of

Fifty-two and 46/100 ($52.46) Dollars, *all in* the sum of one thousand one hundred one and 60/100 ($1,101.60) Dollars; and further have and recover of and from the defendant its costs herein to be taxed.

Defendant renews its exception to the sustaining of the demurrer and excepts to the entry of this judgment and to each and every part thereof and its respective exceptions are allowed.

Done in open court this 14th day of August, 1912.

(Signed) H. E. McKENNEY, *Judge.*

8/1/12.
Form O. K.
(Sgd.) COY BURNETT.

16 Endorsements upon the back of the judgment are as follows: No. 2849. In the Superior Court of the State of Washington for Cowlitz County. State of Washington, Plaintiff, v. Mountain Timber Company, a corporation, Defendant. Judgment. Filed Aug. 20, 1912. (Signed) Homer Kirby, Clerk, by —— ——, Deputy. W. V. Tanner, S. H. Kelleran, Attorneys for Plaintiff. Recorded in Vol. 9, page 394.

That upon the 20th day of September, 1912, there was filed in the office of the Clerk of said court, in said cause, a Notice of Appeal, in words and figures as follows, to-wit:

In the Superior Court of the State of Washington for Cowlitz County.

STATE OF WASHINGTON, Plaintiff,
v.
MOUNTAIN TIMBER COMPANY, Defendant.

Notice of Appeal.

Whereas, on the 14th day of August, 1912, a judgment was rendered in the above entitled cause in favor of the plaintiff and against the defendant in the sum of $1,101.60, together with costs and disbursements, and the time for an appeal to the Supreme Court of the State of Washington from said judgment has not expired, and

17 Whereas, it is the intention of the defendant to appeal from said judgment to the Supreme Court of the State of Washington, Now Therefore,

The plaintiff is hereby notified that the defendant appeals from the said judgment and all thereof to the Supreme Court of the State of Washington.

Dated this 14th day of September, 1912.

(Signed) E. C. STRODE,
A. H. IMUS &
COY BURNETT,
Attorneys for Defendant.

Copy of the within Notice of Appeal received at Olympia, Wash., this 16th day of September, 1912.

(Signed) W. V. TANNER,
Attorney General;

(Signed) S. H. KELLERAN,
Assistant Attorney General,
Attorneys for Pl'ff.

Endorsements upon the back of which said notice of appeal are in words and figures as follows to wit: 2849. Superior Court of the State of Washington for Cowlitz County. State of Washington, Plaintiff, v. Mountain Timber Company, Defendant. Notice of Appeal. Filed September 20, 1912. (Signed) Homer Kirby, Clerk. Offices of Abel & Burnett, Attorneys, 1103-4-5 Yeon Building, Portland, Oregon.

That upon the 20th day of September, 1912, there was filed in the office of the Clerk of said Court, in said cause, a Bond, in words and figures as follows to-wit:

18 In the Superior Court of the State of Washington for Cowlitz County.

STATE OF WASHINGTON, Plaintiff,
v.
MOUNTAIN TIMBER COMPANY, Defendant.

Bond on Appeal.

Whereas, on the 14th day of August, 1912, a judgment was rendered in the above entitled cause and court in favor of the plaintiff and against the defendant in the sum of $1,101.60, together with costs and disbursements, and

Whereas, the defendant has duly given notice of appeal from said judgment to the Supreme Court of the State of Washington, and,

Whereas, defendant desires to supersede said judgment and stay execution thereon until after the determination of said cause by the supreme court of the State of Washington, or other appellate court. now therefore, we Mountain Timber Company principal, and United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety are held and firmly bound to the plaintiff in the sum of Three Thousand Dollars for the payment of which well and truly to be made, we hereby bind ourselves, our successors and assigns, provided, and the condition of this obligation is such that if defendant shall duly prosecute its appeal in the Supreme Court of the State of Washington, and shall pay all costs and damages that may be awarded against it on appeal or satisfy and perform the judg-
19 ment or order appealed from in case it shall be affirmed, or any judgment or order which the Supreme Court shall render or make or order to be rendered or made, by the Superior Court,

shall pay all rents or damages accruing during the pendency of appeal, then and in that event this obligation to be void, otherwise to be and remain in full force and effect.

Dated this 14th day of September, 1912.

(Signed) MOUNTAIN TIMBER COMPANY,
Principal,

(Sgd.) By R. Y. APPLEBY, *Ass't Sec'y.*

[CORPORATE SEAL.]

Surety, THE UNITED STATES FIDELITY & GUARANTY CO.,

(Sgd.) By DOUGLAS R. TATE,
Its Attorney in Fact.

[CORPORATE SEAL.]

Countersigned by

(Sgd.) HARTMAN & THOMPSON,
General Agents.

(Sgd.) THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

(Sgd.) By A. W. ESTES, *Its Attorney in Fact.*

[CORPORATE SEAL.]

Copy of within Bond received at Olympia, Wash., this 16th day of Sept., 1912.

(Sgd.) W. V. TANNER,
Attorney General;

(Sgd.) S. H. KELLERAN,
Assistant Attorney General,
Attorneys for Plaintiff.

Endorsements on the back of the bond are in words and figures as follows, to-wit: 2849. In the Superior Court of the State of Washington for Cowlitz County. State of Washington, Plaintiff, v. Mountain Timber Company, Defendant. Bond. Filed Sept. 20, 1912. (Sgd.) Homer Kirby, Clerk, By —— ——, Deputy. Compared. Offices of Abel & Burnett, Attorneys, 1103-4-5 Yeon Building, Portland, Oregon. Recorded, Vol. 2, page 608.

STATE OF WASHINGTON,
County of Cowlitz, ss:

Certificate.

I, Homer Kirby, Clerk of the Superior Court in and for the County of Cowlitz, in the State of Washington, do hereby certify the above and foregoing to be a full, true and correct copy of the papers therein set out in the above entitled action heretofore pending in said Superior Court, being Action No. 2849, wherein State of Washington is plaintiff, and Mountain Timber Company, a Corporation, is defendant, said record consisting of the complaint, filed

by said plaintiff in said action on February 21, 1912; a motion filed by the defendant on April 22, 1912; an order made and entered in said cause on June 3, 1912; a demurrer filed in said action by defendant on June 12, 1912; an order entered in said cause on July 1, 1912; a notice filed by defendant upon July 27, 1912; a judgment entered August 20, 1912; notice of appeal filed by defendant, September 20, 1912; and bond on appeal, filed by defendant, September 20, 1912; the same constituting the record in said action.

Witness my hand and seal of this Court hereunto affixed this 25th day of November, 1912.

[SEAL.] HOMER KIRBY,
Clerk of Superior Court, Cowlitz County, Washington.

21 Indorsed: Transcript on Appeal to Supreme Court of the State of Washington. Filed Dec. 14, 1912. Homer Kirby, Clerk, By —— ——, Deputy.

22 [No. 11021. En Banc. Filed October 6, 1913.]

STATE OF WASHINGTON, Respondent,
v.
MOUNTAIN TIMBER COMPANY, Appellant.

We are invited by the appellant to reconsider our discussion of the industrial insurance law, Laws 1911, ch. 74.

It is insisted that it is unconstitutional in that (1), it is in violation of art. 4, § 4 of the constitution of the United States which guarantees to every state a republican form of government; (2) of the 4th amendment of the constitution, which secures all of the people against unreasonable searches and seizures of their person and effects; (3) of the 5th and 7th amendments, in that the act deprives plaintiff of its property without due process of law, and for a public use without just compensation, and deprives it of the right of trial by jury; (4) of the 14th amendment, in that it grants privileges and immunities and deprives plaintiff of its property without due process of law and of equal protection of the laws. For the like reason, that it violates art 1, §§ 3, 4, 7, 16 and 21, of the constitution of the state of Washington.

22a The court, as at present constituted, is not disposed to recede from or qualify its opinion as expressed in the case of State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 165. The right of trial by jury under the seventh amendment to the constitution of the United States, the question of a delegation of judicial powers to the industrial insurance commission, and the contention that the law violates the Federal guarantee of a republican form of government, are possibly not covered by the argument of the court in State ex rel. Davis-Smith Co. v. Clausen, supra.

When we say that we sustain a law by reference to the police power that might otherwise be in conflict with some provision of the constitution, it would seem that every incident to that law, as well as all methods necessary to make it effective, are likewise ex-

empted from the prescriptions and limitations of the constitution. The legislature has adopted the idea of industrial insurance, and seen fit to make that idea a workable one by putting its execution, as well as its administrative features, in the hands of a commission. It has abolished rights of actions and defenses and in certain cases denied the right of trial by jury. The legislature has said to the man whose business in a dangerous one and the operation of which may bring injury to an employee, that he cannot do business without waiving certain rights and privileges heretofore enjoyed, and it has said to the employee that, inasmuch as he may become dependent upon the state, that he must give up his personal right of contract when about to engage in a hazardous occupation and contract with reference to the law. These demands are the fundamentals of our industrial insurance law. If the law is not administered as therein provided, it is not likely that a compulsory law such as it is could ever be adequately administered; for, aside from its humane purpose, it was adopted in order that the delay and frequent injustice incident to civil trials might be avoided.

"The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable." Laws 1911, page 345.

To uphold the law in the sense of sustaining the idea of industrial insurance, and to deny the right of executing it without the intervention of the courts, would throw us back on the original ground and we should then, if consistent, hold the idea of industrial insurance to be beyond the limit of the police power.

Police power has been defined as often as changed conditions have required or compelled its extension, although discriminating
22b lawyers and able judges have recognized that there can be no fixed definition. In other words, courts have made a definition to fit the state of facts before them, always admitting that a different state of facts might call for another definition.

It is a long reach between the definition of Sir William Blackstone and our present terminology of the police power. That eminent writer thus defined the term:

"The due regulation and domestic order of the kingdom, whereby the inhabitants of a state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations." 4 Blackstone, Commentaries, 162.

The germ of police power, insofar as it assumes to interfere with private rights, is to be found in the power of the state to suppress nuisances. This right was forced upon the state in the exercise of its functions, or rather duty, to preserve that equilibrium of relative right which must be preserved wherever society is organized. This is indicated by the conception of Kent who found the police power to be "the power to regulate unwholesome trades, slaughter houses, operations offensive to the senses." In the definition of Chief Justice Shaw will be found a wider limit. He described it as:

"The power vested in the legislature by the constitution to make,

ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise." Commonwealth v. Alger, 7 Cush. 53.

In the case of Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, it is suggested that the public health and public morals are matters of legislative concern, and of which the legislature cannot divest itself. In State v. Wagener, 77 Minn. 483, it is said that the exercise of the police power is not confined to matters relating to the public health, morals and peace, but there may be interference whenever the public interest demands it. In Champer v. City of Greencastle, 138 Ind. 339, the court said that "It is known when and where it begins but not when and where it terminates." The insinuation that there may be an exhaustion of the power may well be doubted in the light of the words of Mr. Justice Holmes:

22c "It may be said in a general way that the police power extends to all the great public needs. (Camfield v. United States, 167 U. S. 518.) It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." Noble State Bank v. Haskell, 219 U. S. 104.

Our own cases, those cited in State ex rel. Davis-Smith v. Clausen, 65 Wash., 156, and Karasek v. Peier, 22 Wash. 419; Bowes v. Aberdeen, 58 Wash. 542; Tacoma v. Boutelle, 61 Wash. 443; Shepard v. Seattle, 59 Wash. 363; State ex rel. Webster v. Superior Court, 67 Wash. 40; State v. Somerville, 67 Wash. 643, show a like growth in liberal interpretation.

"In the exercise of police power the legislature may, to a reasonable extent, and with due regard to the public welfare, prohibit or regulate the use of private property; but any provision or regulation of the use and enjoyment of land by the owner which is not limited to the prevention of nuisances is opposed to constitutional principles; and the power of the legislature to prohibit nuisances is confined to the prohibition or regulation of such acts as violate, or materially interfere with, the rights of others." Karasek v. Peier.

"Incapability of definition, however, does not destroy the right of the public to safeguard property, insure the general health, protect the morals, preserve the peace, or compel the use of property consistent with surrounding conditions by the exercise of arbitrary power and in disregard of the primary right of the individual. A subject when measured by other conditions may warrant its exercise; whereas, if the relative condition be lacking, the power will be denied. Its exercise in proper cases marks the growth and development of the law rather than, as some assert, a tyrannical assertion of governmental powers denied by our written constitutions. Although the fundamental truths must from their very nature remain unchanged, the right of property is a legal right and not a natural right, and it must be measured always by reference to the rights of

others and of the public. Neither an individual nor the public has the right to take the property of another and put it to a private use. But it would be manifestly destructive to the advancement or development of organized communities to put the public to the burden of rendering compensation to one, or to many, when the individual use is, or might be, a menace to the health, morals, or peace of the whole community." Bowes v. Aberdeen.

22d "All courts concede the impossibility of adopting fixed rules by which to test the validity of laws passed under the police power. It covers a wide range of subjects, but is especially occupied with whatever affects the peace, security, health, morals, and general welfare of a community. While originally it was used as a rule to indicate the protective function of the government, its development of late years has been in the direction of the function of the state that cares for the general welfare." Tacoma v. Boutelle.

"There are many unpleasant and annoying things that must be borne by those living in a state of organized society, in order that others may enjoy their equal rights under the law, but the preservation of the public health and public safety is one of the chief objects of local government, and every citizen holds his property subject to a reasonable exercise of the police power of the state." Shepard v. Seattle.

"* * * The test of a police regulation, when measured by this clause of the constitution [§3, art. 1.] is reasonableness, as contradistinguished from arbitrary or capricious action. . . . There is no absolute right to do as one wills, pursue any calling one desires, or contract as one chooses . . . liberty means absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." State ex rel. Davis-Smith v. Clausen.

"The police power of the state is more than an attribute of sovereignty. It, like the power of taxation, is an essential element of government, and exists in every state without express declaration and without limitation, in so far as it is made to apply to the health, peace, comfort, and morals of the people. Formerly applied strictly and directly, it has now, because of changed economic conditions, come to be more favored, and is frequently relied upon to sustain laws which but indirectly affect the common good." State ex rel. Webster v. Superior Court.

"The police power which may be invoked to protect the health, property, welfare, and morals of citizens is an inherent attribute of sovereignty, the exercise of which is necessary to secure good government and promote the public welfare. Circumstances and occasions calling for its exercise have multiplied with marvelous rapidity in recent years, by reason of the well-recognized fact that modern, social and economic conditions have called into existence agencies previously unknown; many of which so vitally affect the health and physical condition of laborers, especially female laborers, that legislation of the character here involved has been sustained with

22e greater liberality than was formerly evinced under less exacting conditions." State v. Somerville.

It will be seen that what was originally a rule of inclusion and of exclusion and incapable of exact definition, has developed into a rule of most frequent inclusion. For the peace of the community and the suppression of nuisances, we have undertaken to regulate things hitherto considered private.

To illustrate: We have held that the legislature may enact laws for the promotion of health; provide for the marketing of food products; prevent fraud in the disposition and sale of goods; prevent the doing of certain work and the pursuit of certain occupations upon the Sabbath day; regulate certain trades, businesses and professions; limit the hours of labor upon public works, and fix hours of labor for women; enact drainage laws and fill low lands where drainage is impractical. These are a part only, of the subjects touching private affairs treated under the police power and sustained as needful and proper regulations. Moreover, it has been held that there may be a legal liability without fault and that crimes may be committed without intent.

Having in mind the sovereignty of the state, it would be folly to define the term. To define is to limit that which from the nature of things cannot be limited, but which is rather to be adjusted to conditions touching the common welfare, when covered by legislative enactments. The police power is to the public what the law of necessity is to the individual. It is comprehended in the maxim salus populi suprema lex. It is not a rule, it is an evolution.

The supreme court of the United States on rehearing in the Oklahoma bank case, says of its discussion in the principal case,

"The analysis of the police power, whether correct or not, was intended to indicate an interpretation of what has taken place in the past, not to give a new or wider scope to the power."

It is claimed that this is a qualification of Justice Holmes' definition. We think not. The power has always been as broad as the public welfare and as strong as the arm of the state. We understand the court to mean that conditions have not heretofore called for its final expression. The scope of the police power is to be measured by the legislative will of the people upon questions of public concern, not in acts passed in response to sporadic impulses or exuberant displays of emotion, but in those enacted in affirmance of established usage or of such standards of morality and expediency as have by gradual processes and accepted reason become so fixed as to fairly indicate the better will of the people in their social, indus-
22f trial and political development. If, then, the executive and judicial departments unite to uphold the will of the legislative department, it may fairly be said that all reasonable men can agree that the act is essential for the preservation of the public welfare and that the constitution does not apply.

Whether our present tendency is for the common good, has excited and will continue to excite controversy. That it has so far been sustained by a dispassionate preponderant public opinion is not to be denied. Hence, to hold the idea of industrial insurance to be

constitutional (an idea never offends against a constitution that guarantees free speech and free press) and to hold its incidents and machinery when molded into law to be inoperative because of some constitutional limitation, would lead to absurd results.

"Large discretion is necessarily vested in the legislature when exercising that [police] power, and that the legislature may determine not only what the public interest demands, but also what measures are requisite and necessary to secure and protect the same." State v. Somerville, supra.

In the same case, the writer of this opinion concurred specially, saying in part:

"Until the supreme court of the United States decides otherwise, I am willing to hold—for I believe it is the only consistent thing for the court to do—that in all cases pertaining to the police power, the legislature is supreme unless the general application of the law does violence to the common knowledge of men, in which event a court might properly intervene."

See, also, State v. Considine, 16 Wash. 358.

Our argument upholding the right of the legislature to provide for the execution and administration of the law without resort to the courts is sustained in principle by our decision in the case of Davison v. Walla Walla, 52 Wash. 453, where we held, citing apt authority, that a city might exercise its police power without resort to judicial proceedings.

In so far as the right to a trial by jury under the Federal constitution is concerned, this court has decided that the guarantee of the Federal constitution of the right of trial by jury has no application in the state courts or to prosecutions for the violation of state laws. State v. McDowell, 61 Wash. 398.

The contention that the industrial insurance law is in violation of the guarantee of a republican form of government needs no discussion. It is disposed of by reference to the late cases.

22*g* Pacific States Telephone & Telegraph Co. v. Oregon, 223 U. S., 118; 56 L. Ed. 377; Kiernan v. Portland, 223 U. S. 151; 56 L. ed. 386.

We recognize that this case is appealed to this court in order to bring it to the future attention of the supreme court of the United States. A more extended argument would serve no real purpose. The following cases should be read in connection with our present discussion: Cunningham v. Northwestern Imp. Co., 44 Mont. 180, 119 Pac. 554; State ex rel. Yaple v. Creamer, 85 Ohio St. 349; Borgnis v. Falk Co., 147 Wis. 327; Mondou v. New York, N. H. & H. R. Co., 223 U. S. 1, 56 L. ed. 327; Chicago v. Sturges, 222 U. S. 313, 56 L. ed. 215; Barrow v. Baltimore, 7 Peters, 243, 8 L. ed. 672; Smith v. Maryland, 18 How. 71, 13 L. ed. 269; Flint v. Stone Tracy Co., 220 U. S. 107-174, 55 L. ed. 389-422; Spies ex parte, 123 U. S. 131, 31 L. ed. 80; Thorington v. Montgomery, 147 U. S. 490, 37 L. ed. 252; Fallbrook Irrigation Co. v. Bradley, 164 U. S. 112, 41 L. ed. 369.

The judgment of the lower court is affirmed.

CHADWICK, *J.*

We concur:
CROW, *C. J.*
GORE, *J.*
MAIN, *J.*
FULLERTON, *J.*
PARKER, *J.*
MOUNT, *J.*
MORRIS, *J.*
ELLIS, *J.*

23 In the Supreme Court of the State of Washington, October Session, A. D. 1913.

Monday, November 10th, 1913.

No. 11021.

STATE OF WASHINGTON, Respondent,
v.
MOUNTAIN TIMBER CO., Appellant.

Judgment.

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Cowlitz County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 10th day of November, A. D. 1913, on motion of W. V. Tanner, Esquire, of counsel for respondent, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby affirmed with costs; and that the said State of Washington have and recover of and from the said Mountain Timber Company the cost of this action taxed and allowed at Forty-one and 50/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

24 In the Supreme Court of the State of Washington.

No. 11021.

STATE OF WASHINGTON, Plaintiff,
v.
MOUNTAIN TIMBER COMPANY, a Corporation, Defendant.

Petition for Writ of Error.

To the Honorable Herman D. Crow, Chief Justice of the Supreme Court of the State of Washington, and unto the Honorable Associate Justices and to the Honorable the Supreme Court of the State of Washington:

The Petitioner, Mountain Timber Company, respectfully shows:

I.

That the Mountain Timber Company is a corporation organized and existing under the laws of the State of Nebraska, and at all times has been and now is doing business in the State of Washington with its principal place of business at the town of Kalama in Cowlitz County in said State of Washington, and has complied with all laws in regard to foreign corporations doing business in the State of Washington including the payment of all license fees.

II.

That on the 21st day of February, 1910, there was filed in the Superior Court of the State of Washington, for Cowlitz County, a complaint against Mountain Timber Company, wherein the State of Washington was plaintiff, and Mountain Timber Company was defendant, and in said Complaint it was alleged:

"In the Superior Court of the State of Washington for Cowlitz County.

25 THE STATE OF WASHINGTON, Plaintiff,

v.

MOUNTAIN TIMBER COMPANY, a Corporation, Defendant.

Complaint.

Plaintiff for cause of action against the defendant, alleges:

I.

That at all times herein mentioned defendant was and now is a corporation engaged in the transaction of business in the State of Washington and thereunto duly authorized, having an office and transacting business at Kalama, Cowlitz County, Washington.

II.

That during all the times herein mentioned, the defendant was engaged in the business of operating a saw mill, using power-driven machinery therein, engaged in the business of logging timber, and engaged in the business of constructing and operating a logging railroad, all in Cowlitz County, Washington.

III.

That the estimated payroll of the workmen employed by the defendant in and about its said saw mill, and in its said business of logging, in the extra hazardous employments and departments thereof, for the three months beginning October 1, 1911, as determined from the payroll of the last preceding three months of operation thereof prior to said date, is the sum of thirty-six thousand, six hundred ninety-five and 77/100 Dollars ($36,695.77),

and that under Chapter 74 of the Laws of 1911 there is payable to the state of Washington a premium of two and one-half per cent of said sum, amounting to the sum of nine hundred seventeen and 39/100 dollars, ($917.39); that the estimated payroll of the workmen employed by the defendant in the construction and operation of its said logging railroad in the extra hazardous employments and departments of the same for the three months beginning October 1, 1911, as determined from the payroll for the last preceding three months of the operation thereof prior to said date, is the sum of Two thousand, six hundred thirty-four and 93/100 Dollars ($2,634.93), and that, under chapter 74 of the Laws of 1911, there is payable to the state of Washington a premium of five per cent of said sum, amounting to the sum of one hundred thirty-one and 75/100 Dollars; that the total amount payable from the defendant to the state of Washington *is* a premium on the payrolls of its workmen is the sum of one thousand forty-nine and 14/100 Dollars ($1,049.14).

26 IV.

That demand therefor has been made, but that the defendant has refused and still refuses to pay the same.

Wherefore, plaintiff prays judgment against the defendant in the sum of one thousand forty-nine and 14/100 dollars, ($1,049.14) together with interest thereon from October 1, 1911, until paid; for its costs and disbursements herein; and for such other and further relief as to the Court may seem proper herein."

III.

That thereafter on the 12th day of June, 1912, there was filed in the Superior Court of Cowlitz County, Washington, by the Mountain Timber Company, a demurrer as follows:

1.

That the complaint does not state facts sufficient to constitute a cause of action.

2.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes Section 4 of Article 4 of the Constitution of the United States.

3.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes the fourth amendment of the Constitution of the United States by authorizing unreasonable searches and seizures and violates the right of persons to be secure in their persons, houses, papers and effects.

4.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes the fifth amendment of the Constitution of the United States by depriving defendant of its property without due process of law and takes defendant's private property without just compensation.

5.

For the reason that Chapter 74 of the Laws of the State of Washington is unconstitutional and void in that it is contrary to and infringes the 7th amendment of the Constitution of the United States by fixing a liability upon defendant without trial by jury.

6.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes the 14th amendment to the Constitution of the United States by abridging privileges and immunities of defendant, and by depriving defendant of its liberty and property without due process of law, and denies to defendant the equal protection of the law.

7.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes Section 3 of Article 1 of the Constitution of the State of Washington by depriving defendant of its liberty and property without due process of law.

8.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes Section 7 of Article 1 of the Constitution of the State of Washington because it disturbs defendant in its private affairs, without authority of law.

9.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes Section 12 of Article 1 of the Constitution of the State of Washington because it grants to a class of citizens privileges and immunities which are not upon the same terms or at all granted to any other citizen.

10.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes Section 16 of Article 1 of the Constitution of the State of Washington by taking private property for private use and

taking private property without just compensation having been first made or paid to the court.

11.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes Section 21 of Article 1 of the Constitution of the State of Washington by depriving defendant of the right of trial by jury.

12.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington, is unconstitutional and void in that it is contrary to, violates and infringes Sec. 19 of Article 2 of the Constitution of the State of Washington because it embraces more than one subject, and subjects that are not expressed in its title.

13.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it violates subdivision 5 of Section 28 of Article 2 of the Constitution of the State of Washington, in that it is a special law for the assessment and collection of taxes.

28

14.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes subdivision 17 of Section 28 of Article 2 of the Constitution of the State of Washington by providing a special law for limitation of civil and criminal actions.

15.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes Section 1 of Article 4 of the Constitution of the State of Washington by vesting judicial power in the Insurance Commission in the Industrial Insurance Department.

16.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes Sec. 1 of Article 11 of the Constitution of the State of Washington by taxing property without regard to its value.

17.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes Section 2 of Article 7 of the Constitution of the State

of Washington by providing a means of taxation not according to uniform and equal rates and not for a public purpose.

18.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes Section 5 of Article 7 of the Constitution of the State of Washington by attempting to levy a tax not pursuant of law.

19.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes Section 1 of Article 8 of the Constitution of the State of Washington by creating a debt against the state in excess of $400,000.

20.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes Section 5 of Article 8 of the Constitution of the State of Washington in that the credit of the state is given to and loaned in aid of private individuals and associations of individuals."

29

IV.

That thereafter on towit, the 1st day of July, 1912, there was entered in the Superior Court of Cowlitz County, Washington, in said action there pending, an order in words and figures, as follows, towit:

"This matter coming on regularly this day upon the demurrer of the defendant to the Complaint of the plaintiff herein, the plaintiff appearing by W. V. Tanner, Attorney General, its Attorney, and the defendant appearing by Messrs. A. H. Imus and Coy Burnett, its attorneys, and said matter having been finally submitted to the Court, the court having fully considered the same and being now fully advised in the premises, it is ordered that the said demurrer be and the same is hereby overruled.

It is further ordered that the defendant have until July 25th, 1912, in which to file and serve its answer herein.

To this order the defendant excepts and its exception is allowed."

V.

That thereafter on towit, the 20th day of August, 1912, there was entered in the Superior Court of Cowlitz County, Washington, in said action a judgment, as follows:

"This matter having come on regularly to be heard upon the demurrer of the defendant to the complaint of the plaintiff herein, the plaintiff appearing by W. V. Tanner, Attorney General, and S. H. Kelleran, Assistant Attorney General, its attorneys, and the defendants appearing by E. C. Strode, A. H. Imus and Coy Burnett, its at-

torneys, and said demurrer having been submitted to the court, and having been by the court overruled, and defendant thereupon having been given until the 25th day of July, 1912, in which to further plead, and said time having elapsed, and no further pleading upon the part of the defendant having been received, and the defendant having served upon the plaintiff its notice of election to stand upon its said demurrer, and its exceptions to the overruling thereof, and of its election not to plead further; now upon motion of the plaintiff, the court being fully and sufficiently advised in the premises, and having duly considered the matter, does,

Order, adjudge and decree that the plaintiff have and recover of and from the defendant the premium or contribution payable to the State of Washington under Chapter 74 of the Laws of 1911, upon the estimated payroll of the workmen employed by the defendant for the three months beginning October 1, 1911, to-wit, the sum of One Thousand forty-nine and 14/100 ($1,049.14) Dollars; and further have and recover of and from said defendant interest upon said sum at the legal rate from October 1, 1911, to-wit: the sum of Fifty-two and 46-100 ($52.46) Dollars, all in the sum of One thousand one hundred one and 60/100 ($1,101.60) Dollars; and further have and recover of and from the defendant its costs herein to be taxed.

Defendant renews its exception to the sustaining of the demurrer and excepts to the entry of this judmgnet and to each and every part thereof and its respective exceptions are allowed."

30 VI.

That after the entry of said judgment, your petitioner duly and regularly appealed from said judgment to the Supreme Court of the State of Washington, said appeal duly came on for argument before the said Supreme Court of the State of Washington, and your petitioner, through its counsel duly argued that said judgment so rendered in the Superior Court of Cowlitz County, Washington, should be reversed and said complaint and action should be dismissed for the reasons that Chapter 74 of the Laws of 1911 of the State of Washington was unconstitutional and void in that it was contrary to and infringed Section 4 of Article 4 of the Constitution of the United States.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void, in that it is contrary to and infringes the fifth amendment to the constitution of the United States.

For the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void in that it is contrary to and infringes the seventh amendment to the Constitution of the United States.

And for the reason that Chapter 74 of the Laws of 1911 of the State of Washington is unconstitutional and void, in that it is contrary to and infringes the fourteenth amendment to the Constitution of the United States.

VII.

That on the 6th day of October, 1913, the Supreme Court of the State of Washington, made and entered an order deciding said case wherein it sustained the judgment rendered in the Superior Court of Cowlitz County, Washington, and therein, and thereby held that Chapter 74 of the Laws of 1911 of the State of Washington
31 was not contrary to it in contervention of Article 4 of Section 4 of the Constitution of the United States; that the same was not contrary to or in contervention of the 5th, 7th or 14th amendments of the Constitution of the United States.

VIII.

That the Supreme Court of the State of Washington is the highest Court of the State of Washington in which a decision in the suit hereinbefore mentioned could be had, and that in said suit there is drawn in question the validity of a statute of, and an authority exercised under the State of Washington on the ground of the said statute of the State of Washington being repugnant to the Constitution and the laws of the United States and that in said Supreme Court of the State of Washington the decision is in favor of the validity of such statute, and that in said suit rights, privileges and immunities of Mountain Timber Company, are claimed under the Constitution of the United States, and the decision in the Supreme Court of the State of Washington, is against the right, privilege and immunity especially so set up.

IX.

That the Superior Court of Cowlitz County, Washington, erred in overruling the demurrer interposed by said action.

X.

That the Superior Court of Cowlitz County erred in rendering judgment against Mountain Timber Company.

XI.

That the Supreme Court of the State of Washington erred in entering its order on October 6, 1913, affirming and sustaining the orders and judgments of the Superior Court of Cowlitz County, Washington, and in holding as herein set out.

32 Wherefore, your petitioner prays that a writ of error be allowed, and that it may be issued, and that it may be allowed to bring up for review before the Supreme Court of the United States said order and judgment of the Supreme Court of the State of Washington, entered on the 6th day of October, 1913, and that pending a final decision in said case this court fix the amount of a supersedeas bond to be given by defendant and that your petitioner may have

such other and further relief in the premises as may be just, and your Petitioner will ever pray, etc.

MOUNTAIN TIMBER CO.,
By R. Y. APPLEBY, *Ass't Sec'y.*

E. C. STRODE,
IMUS & GORE, &
COY BURNETT,
Petitioner's Attorneys.

33 STATE OF OREGON,
County of Multnomah, ss:

I, R. Y. Appleby, being first duly sworn, depose and say that I am the Assistant Secretary of Mountain Timber Company in the above entitled petition, and that the foregoing petition is true as I verily believe.

R. Y. APPLEBY.

Subscribed and sworn to before me this 30th day of October, 1913.
[NOTARIAL SEAL.] EDNA L. PATTERSON,
Notary Public for the State of Oregon.

STATE OF WASHINGTON,
County of Thurston, ss:

Due service of the within petition is hereby accepted in Thurston county, Washington, this 31st day of October, 1913, by receiving a copy thereof, duly certified to as such by Coy Burnett, attorney for Mountain Timber Company.

——— ———,
Attorney for State of Washington.

A true copy.

——— ———,
Attorney for ———.

Indorsed: Copy of within petition for writ of error received at Olympia, Wash. this 31 day of Oct. 1913. W. V. Tanner, Attorney General. ——— ———, Assistant Attorney General, Attorneys for Plaintiff. Filed Nov. 10, 1913. C. S. Reinhart, Clerk.

34 In the Supreme Court of the State of Washington.

No. 11021.

STATE OF WASHINGTON, Plaintiff,
v.
MOUNTAIN TIMBER COMPANY, a Corporation, Defendant.

Order.

Now on this 10th day of November, 1913, this cause came on to be heard upon the petition and allowance of writ of error so that the

order and judgment of this Court may be reviewed by the Supreme Court of the United States, and the Court being fully advised in the premises,

Now, therefore, for good cause shown, it is hereby ordered, adjudged and decreed that the said petition be allowed and that said petitioner be allowed to bring up for review before the Supreme Court of the United States the order and judgment entered in this cause in the Supreme Court of the State of Washington on the 6th day of October, 1913, and that pending a final decision in this cause of the Supreme Court of the United States a bond be given by Mountain Timber Company in the penal sum of $2,500, and upon the filing of such bond the judgment of this Court shall be superseded until such final decision. Said bond to be conditioned and executed as required by law.

(Signed) HERMAN D. CROW,
Chief Justice of the Supreme Court of the State of Washington.

35 In the Supreme Court of the State of Washington.

No. 11021.

THE STATE OF WASHINGTON, Plaintiff and Respondent,
v.
MOUNTAIN TIMBER COMPANY, a Corporation, Defendant and Appellant.

Bond on Writ of Error.

Know all men by these presents:

That we, Mountain Timber Company, a corporation, as principal, and United States Fidelity and Guaranty Co. of Baltimore, Maryland, a corporation, as surety, are held and firmly bound unto the State of Washington, plaintiff above named, in the sum of Two Thousand Five Hundred ($2,500) Dollars, to be paid to the said State of Washington, for which payment well and truly to be made we bind ourselves and each of us, jointly and severally, our and each of our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 15th day of November, 1913.

Whereas, the above named defendant and appellant, Mountain Timber Company, a corporation has sued out a writ of error to the Supreme Court of the United States of America, to have reviewed the judgment entered in the above entitled case, on the Sixth day of October, 1913, by the Supreme Court of the State of Washington.

Now, therefore, the condition of this obligation is such that if the
36 above named Mountain Timber Company, a corporation, shall prosecute said appeal to effect without unnecessary delay and answer all costs and damages, if it shall fail to make good

its appeal, then this obligation shall be void, otherwise to remain in full force and virtue.

MOUNTAIN TIMBER COMPANY,
By ROB'T DRAKE, [SEAL.]
Its President.
R. Y. APPLEBY, *Assistant Sec'y.*
UNITED STATES FIDELITY AND GUARANTY COMPANY,
By C. H. CAMPBELL, [SEAL.]
Its Attorney in Fact.

Countersigned by
HARTMAN & THOMPSON,
General Agents.

The foregoing bond is approved.

HERMAN D. CROW,
Chief Justice Supreme Court of Washington.

Endorsements on bond are as follows: Copy of within Bond for Writ of Error received at Olympia, Wash., this 21 day of Nov. 1913. W. V. Tanner, Attorney General. Attorney for Plaintiff and Respondent. Filed Nov. 21, 1913. Fred S. Guyot, Dep. Clerk.

37 UNITED STATES OF AMERICA, *ss:*

To State of Washington, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within Sixty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Washington wherein Mountain Timber Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Herman D. Crow, Chief Justice of the Supreme Court of the State of Washington, this 19th day of November, in the year of our Lord one thousand nine hundred and Thirteen.

HERMAN D. CROW,
Chief Justice of the Supreme Court of the State of Washington.

STATE OF WASHINGTON,
County of ——, *ss:*

On this 21st day of November, in the year of our Lord one thousand nine hundred and Thirteen, personally appeared C. S. Reinhart before me, the subscriber, and makes oath that he delivered a true copy of the within citation to State of Washington, and to its attorney of record, W. V. Tanner, Attorney General of the State of Washington, on the — day of November, 1913.

C. S. REINHART.

Sworn to and subscribed the 21st day of November, A. D. 1913.

[Seal R. E. Campbell, Notary Public, State of Washington. Commission expires June 26, 1914.]

R. E. CAMPBELL,
Notary Public for State of Washington,
Residing at Olympia, Washington.

STATE OF WASHINGTON,
County of Thurston, ss:

I, W. V. Tanner, Attorney of record for the State of Washington do hereby accept and admit due and legal service of the within citation.

Dated this 21st day of November, 1913.

W. V. TANNER,
Attorney General.

Subscribed and sworn to before me this 21st day of November, 1913.

[Seal R. E. Campbell, Notary Public, State of Washington. Commission expires June 26, 1914.]

R. E. CAMPBELL,
Notary Public for Washington.

[Endorsed:] 11021. Filed Nov. 21, 1913. C. S. Reinhart, Clerk.

38 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Washington before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between State of Washington, Plaintiff, and Mountain Timber Company, a corporation, Defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction
39 of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Mountain Timber Company, a corporation as by its com-

plaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the Fourteenth day of November, in the year of our Lord one thousand nine hundred and thirteen.

[Seal of the United States District Court, Western District of Washington.]

FRANK L. CROSBY,
Clerk of the District Court, Western District of Washington,
By E. C. ELLINGTON, *Deputy.*

[Endorsed:] 11021. State of Washington, Plaintiff, v. Mountain Timber Company, a corporation, Defendant. Filed Nov. 21, 1913. C. S. Reinhart, Clerk.

40 In the Supreme Court of the State of Washington.

No. 11021.

STATE OF WASHINGTON, Respondent,
v.
MOUNTAIN TIMBER COMPANY, Appellant.

Clerk's Certificate.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true, and correct transcript of the record in the above entitled cause as the same now remains on file in my office.

And, as directed, I now transmit said transcript, together with the original Citation and the original Writ of Error, to the Supreme Court of the United States.

In Testimony Whereof I have hereunto set my hand and affixed the official seal of the Supreme Court of the State of Washington at Olympia, this 2nd day of January 1913.

C. S. REINHART, *Clerk,*
By FRED S. GUYOT, *Deputy.*

41 In the Supreme Court of the United States.

STATE OF WASHINGTON, Plaintiff (Defendant in Error),
vs.
MOUNTAIN TIMBER COMPANY, a Corporation, Defendant (Plaintiff in Error).

Stipulation.

It is hereby stipulated and agreed that the additional supplemental transcript consisting of assignment of errors and prayer for reversal and stipulation, which were filed with the Clerk of the Supreme Court of the State of Washington on the 14th day of January, 1914, may be filed in this Court and cause.

Dated this 28 day of January, 1914.

W. V. TANNER,
Attorney for State of Washington.
W. H. ABEL &
COY BURNETT,
Attorney- for Mountain Timber Co.

42 [Endorsed:] 859/24010. No. —. In the Supreme Court of the United States. State of Washington, Plaintiff (Defendant in Error), vs. Mountain Timber Company, a corporation, Defendant (Plaintiff in error). Stipulation. Coy Burnett, Portland, Oregon, Attorney for Mountain Timber Company.

43 Filed Jan. 14, 1914. C. S. Reinhart, Clerk.

In the Supreme Court of the State of Washington.

No. 11021.

STATE OF WASHINGTON, Plaintiff,
vs.
MOUNTAIN TIMBER COMPANY, a Corporation, Defendant.

Assignment of Errors and Prayer for Reversal.

The Mountain Timber Company makes the following assignment of errors.

I.

That the Superior Court of Cowlitz County errored in overruling the demurrer interposed to the complaint by Mountain Timber Company.

II.

That the Superior Court of Cowlitz County errored in rendering judgment against Mountain Timber Company.

III.

That the Supreme Court of the State of Washington errored in entering its order in this cause on October 6, 1913, affirming and sustaining the orders and judgments of the Superior Court of Cowlitz County, Washington, and in holding as set out in the transcript herein.

IV.

That the Supreme Court of the State of Washington errored in refusing to hold that Chapter 74, of the laws of 1911 was unconstitutional and void, in that, it is contrary to and infringed Section 4, of Article 4 of the Constitution of the United States.

V.

The Supreme Court of the State of Washington errored in refusing to hold that Chapter 74, of the laws of 1911 of the State of Washington was unconstitutional and void, in that, it is contrary to and infringes the 5th amendment to the Constitution of the United States.

44 VI.

That the Supreme Court of the State of Washington errored in refusing to hold that Chapter 74 of the Laws of 1911 of the State of Washington was unconstitutional and void, in that, it is contrary to and infringes the 7th amendment to the constitution of the United States.

VII.

That the Supreme Court of the State of Washington errored in refusing to hold that Chapter 74 of the Laws of 1911 of the State of Washington was unconstitutional and void, in that, it is contrary to and infringes the 14th amendment to the constitution of the United States.

Wherefore, Mountain Timber Company prays that the assignments of error herein, and each thereof, be held to be well founded and that this case be reversed by the Supreme Court of the United States.

E. C. STRODE,
COY BURNETT,
Attorneys for Defendant, Mountain Timber Company.

45 [Endorsed:] In the Supreme Court of the State of Washington for the County of ——. State of Washington, Plaintiff, vs. Mountain Timber Company, a corporation, Defendant. Assignment of errors and prayer for reversal. Filed Jan. 14, 1914. C. S. Reinhart, Clerk. Coy Burnett, Portland, Oregon, Attorney for Defendant.

46 In the Supreme Court of the State of Washington.

No. 11021.

STATE OF WASHINGTON, Plaintiff,
vs.
MOUNTAIN TIMBER COMPANY, a Corporation, Defendant.

Stipulation.

It is hereby stipulated that the sub-joined assignment of errors and prayer for reversal may be filed forthwith with the Clerk of the Supreme Court of the State of Washington, and then forwarded to the Clerk of the Supreme Court of the United States to become a part of the record heretofore forwarded to the Clerk of the Supreme Court of the United States in this case.

Dated this 5th day of January, 1914.

W. V. TANNER,
Attorney for Plaintiff.
COY BURNETT,
Attorney for Defendant.

Filed Jan. 14, 1914. C. S. Reinhart, Clerk.

47 In the Supreme Court of the State of Washington.

No. 11021.

STATE OF WASHINGTON, Plaintiff,
vs.
MOUNTAIN TIMBER COMPANY, Defendant.

Certificate.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct copy of so much of the record in the above entitled cause as I have been directed by the plaintiff in error to transmit to the Supreme Court of the United States as a supplemental transcript.

In testimony whereof I have hereunto set my hand and affixed the seal of the Court this 15th day of January, 1914.

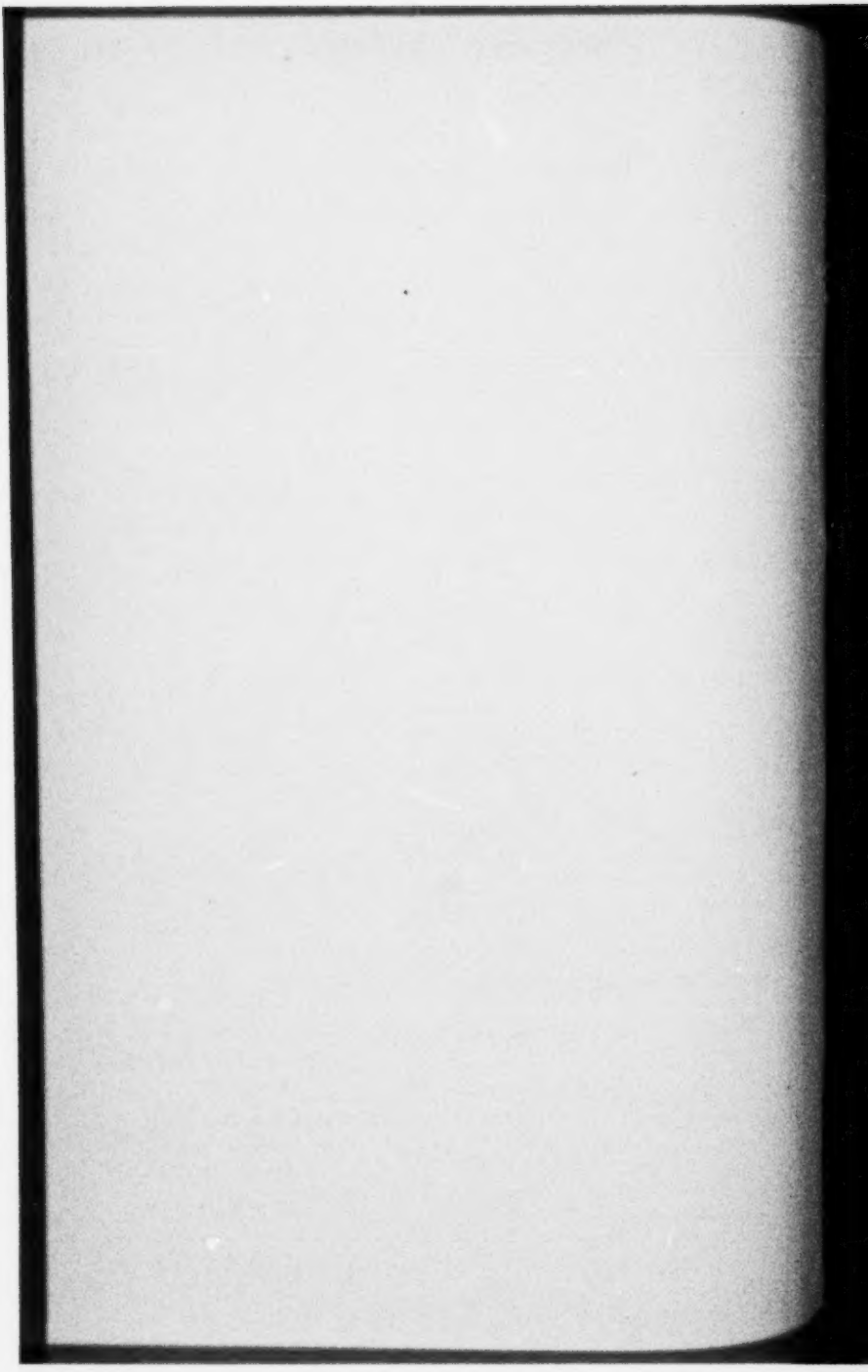
[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court of the State of Washington.

[Endorsed:] 859/24010.

48 [Endorsed:] File No. 24,010. Supreme Court U. S. October term, 1913. Term No. 859. Mountain Timber Company, Pl'ff in Error, vs. The State of Washington. Stipulation of counsel and addition to record. Filed February 16, 1914.

Endorsed on cover: File No. 24,010. Washington Supreme Court. Term No. 332. Mountain Timber Company, plaintiff in error, vs. The State of Washington. Filed January 7th, 1914. File No. 24,010.



In the Supreme Court of the United States.

No. 49 of October Term, 1915.

Mountain Timber Company, Plaintiff in Error,

against

State of Washington.

Counsel for the plaintiff in error in the marginal case hereby move in open Court for leave to file, for convenient reference by the Court, a reprint of a decision of the Supreme Court of the State of Washington rendered June 20, 1916, and since the marginal case was argued and submitted to this Court in March, 1916, the decision of the Supreme Court of Washington being a construction of the Workmen's Compensation Act of the State of Washington which is under consideration by this Court in the marginal case.

The opposing counsel, Hon. W. V. Tanner, Attorney General for the State of Washington, has signified his assent to the granting of this motion by signing the same with counsel for the plaintiff in error.

W. V. TANNER,
Attorney General, Counsel for defendant in error.

EDMUND C. STRODE,
COY BURNETT,
F. MARKOE RIVINUS,
THEODORE W. REATH,
Of Counsel for plaintiff in error.

OCTOBER, 1916.

In the Supreme Court of the United States.

OCTOBER TERM, 1916. No. 13.

Mountain Timber Company, Plaintiff in Error,

vs.

State of Washington, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

REPRINT OF DECISION OF SUPREME COURT OF THE STATE OF WASHINGTON *IN RE* STERTZ *vs.* INDUSTRIAL INSURANCE COMMISSION.

Counsel for the plaintiff in error in this case desire to call to the attention of the Court, pursuant to the authority of the Court by order of October 9th, 1916, the case of Stertz *vs.* Industrial

Insurance Commission, 158 Pac. 256, decided by the Supreme Court of Washington, June 20th, 1916, after the marginal case had been argued and submitted to this Court. The decision construes the Workmen's Compensation Act of the State of Washington, of which the constitutionality is called in question in the marginal case. A reprint of the decision of the Washington Supreme Court here follows:—

STERTZ ET AL. VS. INDUSTRIAL INSURANCE COMMISSION OF WASHINGTON. (No. 13388.)

(Supreme Court of Washington. June 20, 1916.)

1. CONSTITUTIONAL LAW Key 70(3)—JUDICIAL POWERS—ENCROACHMENT ON LEGISLATURE—POLICY OF LAW.

It is not for the courts to say whether the workmen should have a statute absolutely insuring them against injury, but only whether they do have it.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. Key 70(3).]

2. MASTER AND SERVANT. Key 348—WORKMEN'S COMPENSATION — STATUTES — CONSTRUCTION.

The Workmen's Compensation Act (Laws 1911, c. 74), by omitting the words "accident" and "arising out of and in the course of employment," and substituting therefor "fortuitous events" and "injured in extrahazardous work," departs from prevailing systems

and awards compensation without judicial controversies.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. Key 348.]

3. MASTER AND SERVANT Key 371—WORKMEN'S COMPENSATION STATUTES—CONSTRUCTION.

Section 5 of said act providing compensation for each workman injured whether on the premises or at the plant or, he being in the course of his employment, away from the plant, the words "in the course of employment" qualify only when away from the plant.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. Key 371.]

4. MASTER AND SERVANT Key 372—WORKMEN'S COMPENSATION STATUTES—CONSTRUCTION—"INJURY."

Section 3 providing that "injury refers only to injury resulting from fortuitous event as distinguished from contraction of disease," all injuries are intended to be compensated for unless willfully incurred, since only disease is excluded.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. Key 372.

For other definitions, see Words and Phrases, First and Second Series, Injury.]

5. MASTER AND SERVANT Key 348—WORKMEN'S COMPENSATION STATUTES—CONSTRUCTION.

Laws 1911, c. 74, is neither an employer's liability nor workmen's compensation act, but an industrial insurance law, withdraw-

ing from private controversy all phases of injury to workmen; and compensation flows from the commission, which must be sued rather than the employer, it it rejects a claim.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. Key 348.]

6. MASTER AND SERVANT Key 372—WORKMEN'S COMPENSATION—INJURIES COMPENSATED—"FORTUITOUS EVENT."

Said law provides compensation to workmen injured on the premises by intervention of third persons, since it covers every fortuitous event regardless of fault.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. Key 372.

For other definitions, see Words and Phrases, First and Second Series, Fortuitous.]

7. CONSTITUTIONAL LAW Key 245—MASTER AND SERVANT Key 347—DUE PROCESS OF LAW—WORKMEN'S COMPENSATION.

Said law does not violate the due process of law clause of the Constitution by compelling compensation of workmen for injuries due to acts of third persons, against whose acts the employer should have every inducement to guard.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 702; Dec. Dig. Key 245; Master and Servant, Dec. Dig. Key 347.]

8. CONSTITUTIONAL LAW Key 245—DUE PROCESS — WORKMEN'S COMPENSATION — INJURIES COMPENSATED.

It would not be a violation of the due process of law clause of the Constitution to make

the master the insurer of the workman while on the premises.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 702; Dec. Dig. Key 245.]

9. Master and Servant Key 354—Workmen's Compensation—Injuries Compensated.

Under said law, if the workman is injured on the premises from the act of a third person he has the absolute right of compensation from the fund provided; but, if so injured off the premises, he must elect whether to sue the third person or claim from the fund.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. Key 354.]

10. Master and Servant Key 371—Workmen's Compensation Statutes—Construction.

The law does not, by providing compensation only for workmen injured in hazardous or extrahazardous employments, imply that compensation shall be made only for injuries arising out of the work.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. Key 371.]

11. Master and Servant Key 372—Workmen's Compensation Statutes—Construction.

Although it employs the word "accident" in administrative portions of the act, it does not thereby limit the words "fortuitous event" used in the clause granting compensation, since general intent will not control positive definitions.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. Key 372.]

12. MASTER AND SERVANT Key 371—WORKMEN'S COMPENSATION STATUTES—CONSTRUCTION.

Although the employer is required to report whether injury arose out of and in the course of employment of the injured person, that does not restrict compensation to injuries so arising.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. Key 371.]

13. MASTER AND SERVANT Key 396—WORKMEN'S COMPENSATION STATUTES—CONSTRUCTION.

The Legislature, in adopting Laws 1911, c. 74, as to workmen's compensation, having said positively that jurisdiction of courts in controversies over injuries to employes is ended, the courts must liberally construe such provision as well as other portions of the law.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. Key 396.]

Department 2. Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

Proceedings by Louise F. Stertz and her minor children to recover compensation for the death of her husband, before the Industrial Insurance Commission. From a judgment confirming the order of the commission denying compensation, the claimants appeal. Reversed and remanded, with instructions.

T. P. Fisk, of Shelton, for appellants. W. V. Tanner and John M. Wilson, both of

Olympia, and Chas. E. Arney, Jr., for respondent.

BAUSMAN, J. This is a proceeding by the widow and minor children of Stertz, foreman of a logging camp, to recover through the Industrial Insurance Commission statutory compensation for death.

This foreman had suspended for misconduct a workman named Steel but had reinstated him. Steel, discharged a few days later by the president, waylaid the logging train and, wounding one, killed others of the workmen including Stertz, who was in charge of the train as foreman. Only those were assailed with whom Steel, while a workman, had had quarrels concerning his tasks. The present claimants are not shown to have collected or sought damages from Steel, but their claims were rejected both by the commission and the superior court. The sole argument now made to sustain their rulings is that the statute contemplates only "accident" as that term is popularly understood and also as "arising out of" the employment. These words nowhere occur in any of the definitions or granting clauses of our statute. Far stronger terms occur.

We are now brought to a point where we must explore this noble legislation with a view to some interpretation both decisive and general. Our legislators, with three systems to imitate, chose

the most sweeping. There was that of England, which least interferes with employers, a liability act removing defenses but prescribing no way in which the employer must provide for the claim. There was that of Denmark and Sweden, in which the state issues policies to the employed at the master's expense. Finally, there was that of Germany, which ours most nearly resembles, and which provides both the remedies and the fund by compulsory insurance with contribution of employers collectively. Even the German scheme was somewhat exceeded; for the private parties under our law have no participation in the management, nor, during a first period of three months, does our workman contribute something toward the loss, as he did under the German.

Our act came of a great compromise between employers and employed. Both had suffered under the old system; the employers by heavy judgments of which half was opposing lawyers' booty, the workmen through the old defenses or exhaustion in wasteful litigation. Both wanted peace. The master, in exchange for limited liability, was willing to pay on some claims in future, where in the past there had been no liability at all. The servant was willing, not only to give up trial by jury, but to accept far less than he had often won in court; provided he was sure to get the small sum without having to fight for it. All

agreed that the blood of the workman was the cost of production, that the industry should bear the charge.

By the working class, the new legislation was craved from a horror of lawyers and judicial trials. What they wanted, as this act expressly recites in its first section, was compensation, not only safe, but sure. To win only after litigation, to collect only after the employment of lawyers, to receive the sum only after months or years of delay, was to the comparatively indigent claimant little better than to get nothing. The workmen wanted a system entirely new. It is but fair to admit that they had become impatient with the courts of law. They knew, and both economists and progressive jurists were pointing out, what is now generally conceded, that two generations ought never to have suffered from the baleful judgments of Abinger and Shaw.

[1] It is for us to say, not whether our workmen ought to have a statute which insures them absolutely on the master's premises, but whether they do have it. What they gave up for it is great, trial by jury and unlimited damages. The former was an undeniable advantage, the latter had often brought them fivefold what is afforded by this act, which gives not to exceed $4,000 for a life and $1,500 for the loss of a limb or an eye. What laborers desired was not mere removal of

the old defenses. Moreover, the English statute that had removed these had already begotten whole volumes of contests over the new words "accident" and "arising out of employment." Well may ours have used unqualified words to create an undebatable recovery when the injury should occur at the place of work, which even the common law had required the master to maintain in safety.

[2] Those who drafted our law had before them many foreign statutes during the long and careful preparation of this; so we are at once struck by the absence of many familiar terms. In some of those the right of action springs from "accident;" in others from an injury arising "during and in the course of employment." The English statute is "personal injury by accident arising out of and in the course of employment." Simple as these terms appear, they have filled volumes with discussion. Not one of them appears in any of the enabling or granting provisions of our law. Wherever a right is conferred or definition given, ours is unqualified. Indeed, our statute is in these features the least qualified that can be found. The intention to get rid of judicial controversies is apparent throughout. We have already recognized that intention.

> "* * * Aside from its humane purpose, it was adopted in order that the delay and frequent injustice incident to civil trials might be avoided." Chadwick, J., in State *vs.*

Mountain Timber Co., 75 Wash. 551, 583, 135 Pac. 645, 646.

Having seen what was not inserted, let us see what was. Let us examine definitions carefully made. The first section, after stating that industrial relations in all hazardous employments are matters for police regulation, that injuries are frequent and inevitable and that controversies about them are wasteful, declares that:

> "All phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra-hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding, or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided." (Laws 1911, c. 74.)

The third section, that of definition, defines "workman":

> "Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his em-

ployment, away from the plant of his employer."

We shall quote later a proviso appended to this definition and relating to injuries from third persons.

"Dependent" was defined as certain "relatives of a workman whose death results from any injury and who leaves surviving," etc.

The fifth section, the granting clause of compensation, is as follows:

> "Each workman who shall be injured whether upon the premises or at the plant or he being in the course of his employment, away from the plant of his employer, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with the following schedule, and, except as in this act otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever."

[3] Obviously and clearly, the qualifying "in the course of employment" does not apply to "on the premises." Had that been intended, the arrangement was natural and easy. Thus, "When the workman is injured in the course of his employment either upon the premises or away from the plant." Surely we must assume a reason for the other peculiar order. Nor did that order come of chance. It is precisely repeated, we have just

seen, in the definition of "workman." Even the punctuation is most carefully repeated there.

[4] "Injury," too, was given a definition:

> "The words injury or injured, as used in this act, refer only to an injury resulting from some fortuitous event as distinguished from the contraction of disease."

In this last we notice, first, not merely the avoidance of "accident," but of "arising out of the employment," the use of which this definition fairly invited if that were to be meant; second, exclusion by enumeration. Disease is excluded; everything else is included. Lastly "fortuitous event," the strongest term that could be used, no popular expression, but one used by lawyers for positive strength, a term in truth that is selected when one wishes all of "accident" and more. Black thus defines it:

> "There is a difference between a fortuitous event, or inevitable accident, and irresistible force. By the former, commonly called the 'act of God,' is meant any accident produced by physical causes which are irresistible; such as a loss by lightning or storms, by the perils of the seas, by inundations and earthquakes, or by sudden death or illness. By the latter is meant such an interposition of human agency as is, from its nature and power, absolutely uncontrollable."

Only one other kind of claim is excluded, that based on intentionally or willfully incurred inju-

ries. These the act itself elsewhere mentions and excludes without other language of consequence here.

We have now the provisions upon which compensation has to be granted or denied. The universally employed terms by which the injury must spring from the business are not there. Very opposite phraseology is used. The Supreme Court of the United States, in Holden *vs.* Stratton, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018, had occasion to consider the statute of this state which exempts the proceeds of life insurance policies from creditors. That our statute was using extreme, almost unreasonable, language being pointed out, it was argued to the court that the words must therefore be given more moderate meaning and must be interpreted in the policy of milder statutes of other states, but the Supreme Court said:

> "The wide departure from the legislation of many of the other states, shown by the unrestricted terms of the Washington statute, instead of manifesting the intention of the Legislature of that state to narrow the exemption to conform to the statutes of other states, on the contrary conclusively shows the intention of the Washington Legislature to adopt a broader and more comprehensive exemption."

[5] To resume, ours is not an employers' liability act. It is not even an ordinary compensation

act. It is an industrial insurance statute. Its administrative body is entitled the Industrial Insurance Commission. All the features of an insurance act are present. Not only are all remedies between master and servant abolished, and, in the words of the statute, all phases of them withdrawn from private controversy, but the employe is no longer to look to the master even for the scheduled and mandatory compensation. He must look only to a fund fed by various employers. When the employer, for his part, pays his share into this fund, all obligation on his part to anybody is ended. Let a claim be rejected by the commission, the latter and not the employer is to be sued. Nor is the commission so much as selected by the parties. The state administers the fund. Few foreign countries had yet adopted a scheme so comprehensive. Germany alone furnished a precedent. In subsequent legislation in this country only one or two states have adopted this principle and none have pushed it so far.

[6] To sum up, our act positively ends the "jurisdiction of the courts" on "all phases" of master and servant liability. Now, it is undeniable that liability for a stranger's acts on the premises is one of those phases, undeniable that in nearly every such case a question immediately arises whether it is not the master who may have to respond. But, it is said, we cannot hold such

liability indisputable under this statute, without establishing a construction that would make the master liable for such extreme things as death by lightning. Let us, therefore, review the statute again with both kinds of accident in view.

We have seen that, as the first section put an end to all civil actions appertaining to master and servant liability, so the fifth declared that the compensation "shall be in lieu of any and all rights of action whatsoever against any person whomsoever." Next, we have seen in the first section that compensation is to be paid regardless of fault. Thus, there was to be compensation for some injuries not actionable before. For instance, let a machine which was excellently made, excellently inspected, and excellently operated cause injury by capricious action contrary to all human experience, in a word, let nobody be to blame, a servant under the common law could not recover, for the master had not been at fault. Yet that this act means to give compensation in just such a situation can never be questioned. We start accordingly with liabilities before unknown, "a sure and certain relief for workmen regardless of questions of fault."

From the outset the creating of new liabilities was conceded. In the first debate in this court over the act, an opening challenge was the new liability without fault taking away the employer's

due process of law; and an illustration was given which it was thought would make the law ridiculous. Let the workman while at work be injured by a stranger's throwing something in from the street, there would be a claim for recovery; he would be injured "on the premises"; the injury would be from "fortuitous event." That such a claim would seemingly come under the act was referrred to but left undecided by Justice Fullerton in his exhaustive opinion. State *vs.* Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466. He held under indisputable precedents that, notwithstanding the due process guaranty, courts had already sustained statutes imposing degrees of liability regardless of fault, and these decisions sustained ours in most of the new liabilities. As to others, if these were improper, the act by its own terms could stand without them. The apparent scope of the statute he conceded:

> "It is claimed that the act allows workmen employed in such industries the benefit of the act when injured outside of the lines of their duties, or when engaged in the business of the concern in a capacity not affected by the peculiar hazards of the business. We have quoted enough of the statute to show that it is somewhat obscure in these respects; but we are not inclined to think the point fatal to the act, even though we concede counsel's interpretation of it to be the correct one."

It is curious that the very illustration flung at our act to make it ridiculous has not been held ridiculous, even under the narrow English statute. In Challis *vs.* London, etc., Ry. Co., 2 K. B. (1905) 154, it was held that the employer was liable for the death of a locomotive engineer injured by a stone thrown from a bridge above by a mischievous boy.

[7, 8] Nor can we see that, under the constitutional objection of due process of law, the complaint of the employer is sounder when he pays for injuries caused by the meddling of a stranger on the premises than when he pays for injuries from a perfect machine. The question is one of degree and often of small degree. For that the master should have every possible inducement to shield his workmen at their tasks from the meddling of third persons is plain, and instances are ample where his failing so to protect them must make him liable at common law. Having pronounced constitutional, then, an act which compels both employers and employed to go into a scheme of insurance, we do not hesitate to say that the difference in new or added liability by the act of a stranger on the premises is not enough to make it unconstitutional. It is but a slight extension of the common-law assurance of a safe place to work. Neither would it be a violation of the due process guaranty to make the master an insurer

of the workman at the shop. The Supreme Court of the United States in upholding the Nebraska statute, making railways insurers of passengers (Railroad Co. *vs.* Zernecke, 183 U. S. 586, 22 Sup. Ct. 231, 46 L. Ed. 339) said:

> "Our jurisprudence affords examples of legal liability without fault, and the deprivation of property without fault being attributable to its owner."

[9] Turning back now to the definition of "workman," we may read that again with its immediate proviso:

> "Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer: Provided, however, that if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ the injured workman, or if death result from the injury, his widow, children, or dependents as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; if the other choice is made, the

> accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case."

With the whole section before us we perceive that, when a workman is injured off the premises by a stranger, he must elect whom he shall sue, and that no electing is imposed on him when he is injured by a third person upon the premises. Of the latter situation nothing is said. Now from this silence one of four things must be true. Either when thus injured on the premises he has no right whatever to collect from the fund, or he has the right to collect from both the fund and the stranger, or only from one and then with waiver as to the other, or lastly only from one without waiver. The second conclusion is grossly improbable; the third would unfairly make him elect at his peril; the last, plausible, is illogical, for since he has to elect when the third person injures him off the premises, why not when injured upon them too? What possible reason for the right or necessity in one case and not in the other? Nothing answers this satisfactorily, except the first conclusion that, when injured upon the premises, only one defendant is possible. This conclusion is irresistibly supported, first, by the words "in lieu of any persons whom-

soever," found in the compensation section already quoted; second, by the arrangement of the words "in course of employment;" and, lastly, by the policy of this act which may well be supposed to end debate over involved situations, while furnishing to the master the highest inducement to protect his workmen from inquisitive strangers, meddlers, careless co-operating employers, or dangerous persons of any sort.

In fine, this difference between the main clause and the proviso lies in the act's conceding an exclusive claim against the employer for all injuries on the premises by strangers. This last was reasonable. When an injury thus occurs, there must so often be involved the relations of the employer with that stranger, or the character of the employment itself as inviting strangers, that we can see a policy of unqualified right against the fund. Suppose a vistor invited to the factory by the employer cause the injury. Is the fund liable? If so, is it liable also when the visitor comes without invitation? Is it liable if the injury occur in a room where the stranger ought not to have come and the workman, knowing he ought not to have come, should have put him out? Endless are these distinctions. Is a dray company to answer for an injury to a factory hand, caused by one of its teams, in a part of the factory where the owner of the

factory ought not to have let it come? Is the fund to be sued or the dray company? Why is the workman compelled to make the perplexing decision? Why is it not better policy that the master shall keep his premises at all times secure?

That against some third persons the workman has no suit for injuries on the premises this court has already decided. Even without considering the proviso about injuries off the premises (a portion of the statute not pressed upon the attention of the court), we held in Peet *vs.* Mills, 76 Wash. 437, 136 Pac. 685, L. R. A. 1916A, 358, Ann. Cas. 1915D, 154, that the fifth section, stating the compensation to be "in lieu of any and all rights of action whatsoever against any person whomsoever," prevents personal suit against the president of a railway company for injuries in the company's operation, though to him personally the particular neglect was charged. The workmen's claim must be against the fund. We made emphatic not only the words just quoted from the act itself, but also that the compensation was to cover, as we expressed it ourselves, "every injury sustained by any workman while employed in any such industry, regardless of the cause of the injury or the negligence to which it might be attributed," because the statute said that the abolition of actions theretofore existing was "irrespective of the persons in favor

of whom or against whom such right might have existed." Just before this decision Judge Cushman in the federal District Court for this district had reached the same conclusion from the statute alone. Meese *vs.* Northern Pacific R. Co. (D. C.) 206 Fed. 222. A brewery employe, he held, could not elect to sue a carrier, which had injured him at the plant. His judgment was reversed by the Circuit Court of Appeals, though our Peet Case was then before it. It distinguished that case on the ground that the company's president, though personally sued, must not be treated as a third person or stranger, but the Supreme Court of the United States has in turn reversed the intermediate court and has construed the Peet Case as confirming the conclusion of Judge Cushman. Northern Pacific R. Co. *vs.* Meese, 239 U. S. 614, 36 Sup. Ct. 223, 60 L. Ed. ——. Judge Cushman, it may be added, had commented on the force of the proviso in the section we have discussed.

In Ross *vs.* Erickson Co., 155 Pac. 153, we followed the Peet Case, and denied the right to sue an employer's surgeon for malpractice, after award accepted from the commission for the loss from the injury. The authorities and the purpose of the law were exhaustively reviewed by Justice Chadwick, and the conclusion repeated that suit against third persons for injuries on

the premises was abolished. The court laid emphasis on that part of the statute which forever removes "all phases" of the liability during employment. Authority accordingly is added to both policy and expression. The right of suit against third persons for injuries on the premises is taken away from the workman. To whom, then, does he look? Since the stranger cannot be made to pay him, the fund must. It would be intolerable to suppose that for this wrong he should have no redress at all.

To pronounce unqualified liability for injuries at the workshop grows easier the more it is considered. Shall we repulse the workman injured, say, in voluntarily fighting flames, or defending his master against assault, or the passengers on a train from a bandit? These are acts not to be discouraged and yet not paid for at common law. The workman who flees at such a time is viewed with contempt. Is he to pay himself for the burns and blows? The English courts, we may observe, have compensated "emergency" acts done in the interest of his employer, Rees *vs.* Thomas, 80 L. T. R. 578; Harrison *vs.* Whitaker Bros., 16 T. L. R. 108; Whelan *vs.* Moore, 43 Ir. L. T. 205; and even his voluntary attempt to save the life of a fellow employe, Matthews *vs.* Bedworth, 1 W. C. C. 124. If our statute aimed to cover them all, it is not extraordinary. Even

a few unusual causes of injury may well be charged to the fund, some of which will on reflection, it may be added, be found less unfair to the employer than a first consideration. Let us take an example. To say that the master, notwithstanding the strength of "fortuitous event," might be liable if the workman was struck by lightning seems at first preposterous. But let us look at the workman's point of view. The latter argues, in effect, that if he had not been at the factory that day he would not have been struck by lightning; that it was the purpose of this act to give the workmen every reason for fidelity and courage at the place of work; that part of the basis for the statute was the fact that the workman can seldom carry his own insurance; and that on his sudden death his widow and children are too often a charge upon the community.

The purpose to get rid of contention is the plainer, when we consider in how many adjudicated cases under the other statutes the injured man is forced to argue about "arising out of the employment." Nothwithstanding that noon recesses at the workshop are generally conceded to be hours of employment in those statutes, we have a workman in one decision injured while going from a higher to a lower floor at noon to

receive a free lunch served by the employer. He must go to law about it. Was he or was he not in the course of employment? Again, a workman's claim was contested when, during excessively hot weather, he went to the roof in working hours for cooler air and fell to the street. So, a boy employed to piece together broken ends of yarn good-naturedly attempted to clean a machine and was injured. Not hired to clean machines, he was held not to have been hurt "in the course of employment." Such are the debates on which claimants really within the purpose of these laws have often had to waste their compensation. Let it be remembered, too, that the employer himself is no longer liable; that doctrines, which might seem harsh were this an employer's liability act, or the common law still prevailing, are now reasonable under assessment upon the industry at large. This insurance scheme is founded on contributions on both sides, the workman contributing his reduced damages, the employer getting that and conceding more liabilities.

The best argument against the construction to which we are tending would be that, under it, recovery would be possible for some fortuitous events that under no circumstances could spring from a fault of the employer. Yet the further we search the more difficult it is to find any such. Death by lightning, it might be said, would be an

instance, death from a wanton pistol shot. As to the latter, the English courts have had to arrive at a conclusion. A gamekeeper was shot by a poacher. Even under the rigid English act, "accident arising out of" the employment, it was finally held that this was an accident (though the common understanding of that term is certainly not death by assault), and that it arose out of the employment. Anderson *vs.* Balfour, 2 Ir. Rep. (1910) 497. Now, if this be thought a conclusion none too strong, what shall be said about the case of the cashier who, while carrying his master's money, was assaulted and robbed? This was held to be an accident arising out of an employment. Nisbet *vs.* Rayne, 2 K. B. (1910) 689. So as to injury from lightning. Some situations during storms are more hazardous than others. Various kinds of machines invite the electrical contact from the skies while others do not. In short, the employment or the orders of the master may have a good deal to do with the injury of the workman in an electrical storm. A case has recently been decided in Minnesota, where a driver struck by lightning was allowed judgment as from an accident. State *vs.* District Court, 129 Minn. 502, 153 N. W. 119, L. R. A. 1916A, 344. So in the English case of Andrew *vs.* Failsworth Industrial Society, 90 L. T. R. 611, the master was held liable for death by lightning, when

the workman during the storm was at work on the top of a building. Now, if there be any occasion in which damages can be had for death from lightning, the policy of our law might be to have no debate about it in any instance; because, if the workman must contend when he has not the right to recover, he will have to contend also when he has the right to recover. Let us recur to the child who was injured in oiling machinery, when he was hired only to work at strands of yarn. From an economic, sociological standpoint it is waste to throw the child helpless upon society for what may have been a well-intended, though mistaken, act, during employment. If he has to debate in a situation like that, then he may have to debate when he walks from his own machine to lend a hand at a co-worker's machine on the other side of the room.

To seek authority in the decisions of other states is useless, for other statutes have no resemblance to ours. Those decisions are but painful struggles at interpretation of "arising out of," "accident," and "course of employment," which we believe were intentionally left out of our statute. Only one good is found in looking at those cases. They show what evils of litigation are escaped in our enactment. For instance, the Connecticut case of Mann *vs.* Glastonbury

Knitting Co., 90 Conn. 116, 96 Atl. 368. A room was heated by a pipe two feet in diameter, which brought in warm air. With the acquiescence of the employer workmen would place coffee bottles at the mouth of this pipe, but, when one placing his at another opening was injured by a revolving fan, it was held that the injury did not "arise from the employment," notwithstanding it was conceded that employers were liable for injuries suffered by workmen in doing something "outside of obligatory duty permitted for mutual convenience, such as eating his dinner on the premises." These cases show the refinements to which courts are driven, the contests which workmen have to make at every turn under statutes of a qualified sort, that the new controversies, over "arising out of," are but revivals of old contests over contributory negligence and assumed risk, though to get rid of these was the express announcement of the law. In our own court an instance is afforded. A workman injured by hernia resulting from a great strain in lifting at his work got his relief only after this court was reached. Zappala *vs.* Industrial Ins. Com., 82 Wash. 314, 144 Pac. 54, L. R. A. 1916A, 295. It is perfectly plain that there was a charge which the industry should bear; but, assuming in this act the word "accident" and the phrase "arising out of the employment," contest was at once made possible and contest was pro-

longed. Another instance of our own is Wendt *vs.* Industrial Insurance Com., 80 Wash. 111, 141 Pac. 311. A carpenter in a department store turns on an electric switch in a repair shop to start the wheel on which he would grind a tool. The electricity was not in his care or department. He was compelled to obtain the decision of our highest court before he could get his redress.

We decline to read into our act either the narrow word "accident," or the phraseology found in the English and other statutes. We prefer to leave it the force of clear and positive language designed to cure the past mischiefs of endless contention. The reports of other states already abound in contests over the new phraseology. It is for the Legislature, not for this court, to modify, if it appear wise so to do, the plain language of our statute.

(10) We have not overlooked an argument in the word "hazardous" and "extrahazardous." Since, it is said, the act compensates only persons in such employments, it meant to compensate them merely for injuries arising out of the work. This is falacious. In the first place, we cannot sustain that construction against plain terminology. Second, the circumstances show a difference in the intention. The workman was giving up unlimited damages and trial by jury. He

could in exchange make for his class what terms he pleased, and the statute made those terms between him and his employer. That nonhazardous employments were not making terms, too, is of little moment.

(11) "Accident," it is urged, does appear in sundry administrative sections of the act. Now, it does not appear in any parts deliberately stating the basis of compensation, and even injury was powerfully defined as fortuitous event. "Accident" was used for brevity as a convenient substitute for "fortuitous event" in the administrative details of the act; and no court must construe a statute on general intent against positive definitions.

(12) In one section, the employer, being required to make reports of accidents, is directed to state whether the accident "arose out of or in the course of the injured person's employment." By no language whatever is this section made the basis of compensation or so connected with the compensatory provisions of the law as to give it other than statistical value for information to the department. Moreover, in the preceding clause it is stated that the report must be made whenever any accident or injury whatever occurs. This section, in short, makes no attempt to indicate which shall be paid.

(13) In conclusion, even judicial decisions under the qualified statutes show that we can give full vigor to "injured on the premises" without raising a host of claims untolerated elsewhere. We have seen, in a word, the cases of lightning, of protecting a fellow employee, of the engineer killed by the boy from the bridge, of the assaulted cashier, and the assassinated gamekeeper. But, since each new situation has always some difference, it is an infirmity if workmen are compelled always to argue over interpretation. Interpretation by instance is endless. The framers of this law having said positively that they wish the jurisdiction of courts ended on these controversies, it is our duty to give liberality as much to that as to other provisions of the law.

The situation indeed does not greatly differ from that which once obtained in life insurance. The early policies reserved to the company a perpetual question for any misrepresentations made to obtain them; and, while this right was rarely exercised, yet it was exercised at times and the right to exercise it was found so disquieting that the practically unqualified policy has taken the place of the other. To obtain this situation under the compensation act was undoubtedly the purpose of the workmen. It is also to our mind the language of the law.

Under our statutes the workman is the soldier

of organized industry accepting a kind of pension in exchange for absolute insurance on his master's premises.

The judgment of the lower court is reversed and the cause remanded, with instructions to enter a judgment against the commission for the amount of appellant's claim.

MORRIS, C. J., and MAIN, HOLCOMB, and PARKER, JJ., concur.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

MOUNTAIN TIMBER COMPANY,
Plaintiff in Error.

vs.

STATE OF WASHINGTON,
Defendant in Error.

No. 332.

IN ERROR TO THE SUPREME COURT OF WASHINGTON.

Brief of Defendant in Error.

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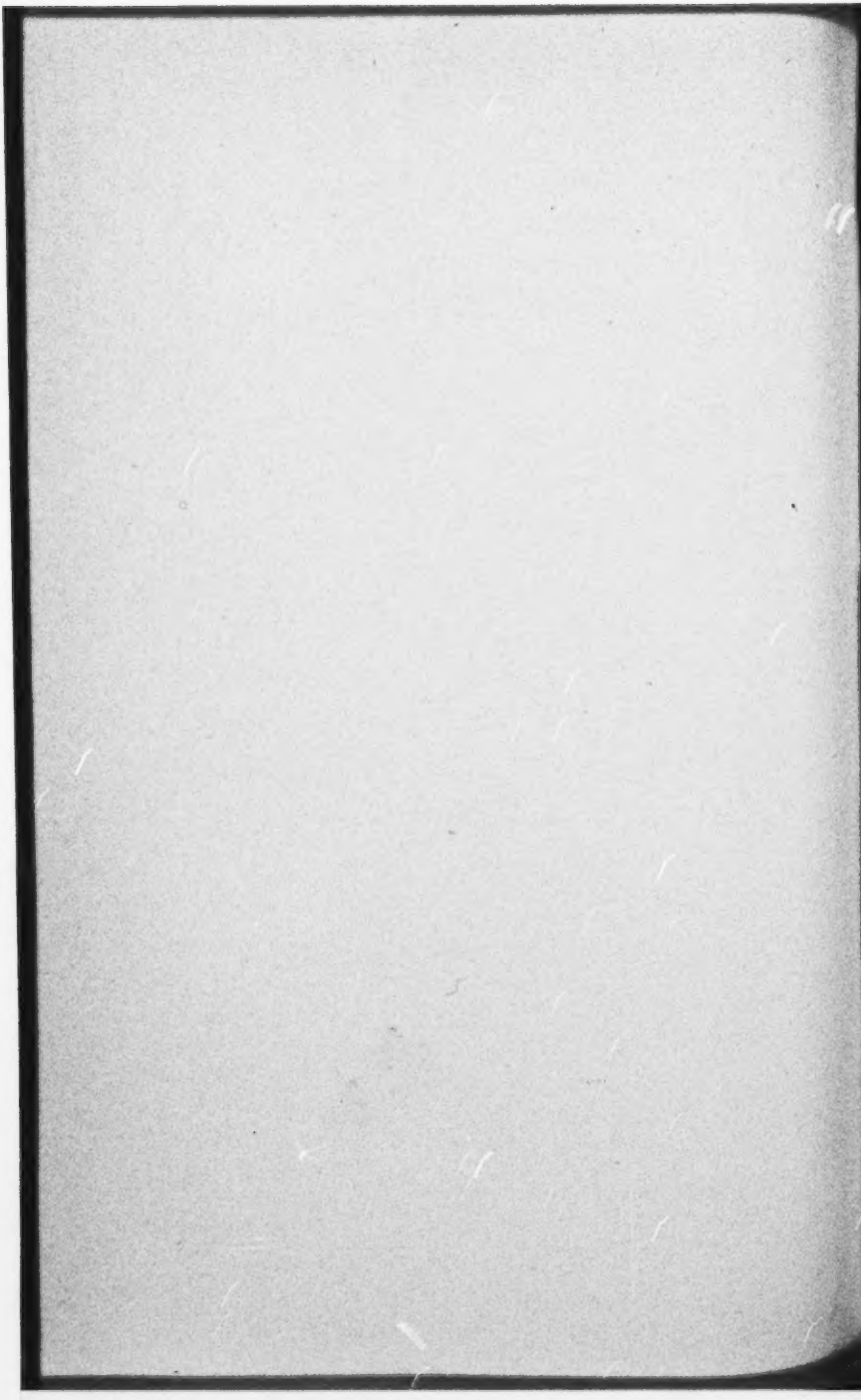

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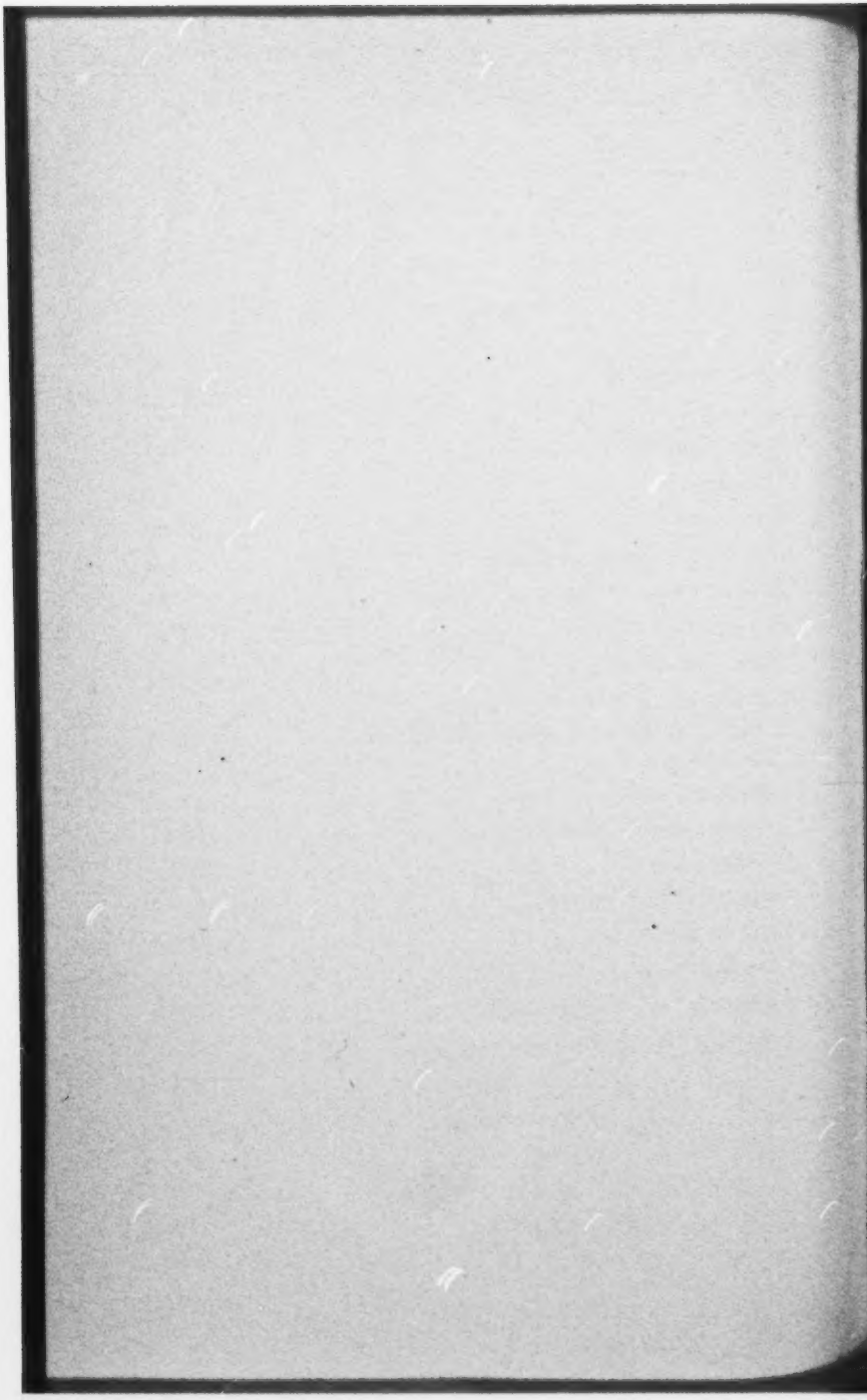

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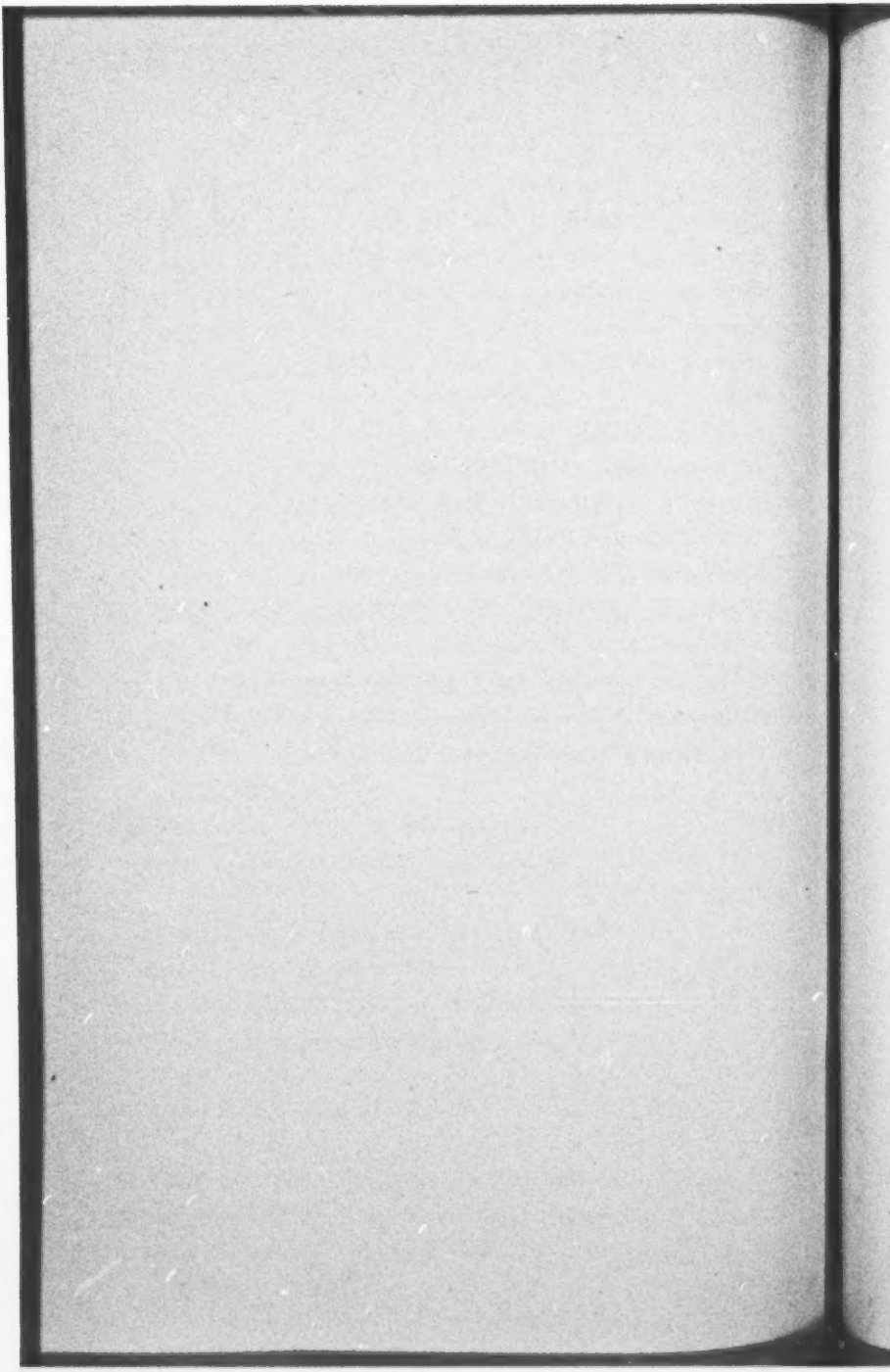

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STATEMENT OF THE CASE.

This action was brought in the superior court of the state of Washington for Cowlitz county, for the recovery of the premium due under the Workmen's Compensation Act of the state of Washington on the wages of workmen employed by plaintiff in error in the operation of its sawmill and logging enterprises

and in the construction and operation of its logging railroad.

The complaint alleges (Trans. p. 2) that the defendant is engaged in carrying on these enterprises, and sets forth the amount of the payroll of its workmen for the months beginning October 1, 1911 (the date upon which the law became effective), as determined from the payroll of the preceding three months, and the percentage thereof payable to the state under the law. It is also alleged that a demand has been made for the sum due, but that the defendant has refused to pay the same. The defendant interposed a demurrer to the complaint (p. 5) upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer also sets forth nineteen constitutional objections to the act. Upon the overruling of this demurrer the defendant refused to plead further, and thereupon judgment was entered against it in accordance with the prayer of the complaint (p. 10).

Upon appeal the supreme court of the state affirmed the judgment of the superior court (p. 20) and the case is here upon writ of error (p. 31).

The sole question presented for the determination of the court is the validity of the Workmen's Compensation Act of the state of Washington (Laws of Washington 1911, ch. 74).

The validity of this act was first sustained by the supreme court of the state in *State ex rel. Davis-Smith Co. v. Clausen,* 65 Wash. 156, and again in the case at bar: *State v. Mountain Timber Co.,* 75 Wash. 581. The act has also been sustained by the district court of the Western district of Washington in *Stoll v. Pacific Coast S. S. Co.,* 205 Fed. 169.

Section 1 of the law is an assertion of the police power of the state; it declares that the form of relief for workmen provided in the act shall be exclusive of every other remedy; and abolishes all civil actions for personal injuries in such cases, except as in the act provided.

Section 2 enumerates certain extra hazardous employments, declaring also the purpose of the act to include any other extra hazardous employment which may exist or subsequently arise.

In criticising this section, plaintiff in error (Brief, page 4, paragraph 3) assumes that the legislature of Washington in this case acted without mature or specific study, indicating gross lack of attention to the hazards of the various employments specified. The Court approaches an act of the legislature from the opposite standpoint, and in so doing the Court would act correctly in this case. This is demonstrated by a consideration of the official reports of the Industrial Insurance Commission of the State of Wash-

ington, made annually to the Governor as required by the statute. These reports show (for the three year period, October 1, 1911, to October 1, 1914) that 903 fatal accidents occurred in the industries covered by the act. These were distributed among the 47 classes specified in Section 4 except ten, the exceptions being classes 4, 12, 22, 25, 30, 40, 41, 44, 45 and 47. During the same period there occurred in the excepted classes injuries to workmen who were compensated under the act, as follows: Class 4, 36; class 12, 86; class 22, 172; class 25, 31; class 30, 8; class 40, 90; class 41, 115; class 44, 95; class 45, 8, and class 47, 49.

Paragraph 4 of page 4 of the brief of the plaintiff in error we understand to be a criticism of the closing sentence of section 2, reading: "If there be or arise any extra hazardous occupation or work other than those hereinabove enumerated, it shall come under this act, and its rate of contribution to the accident fund hereinafter established, shall be, until fixed by legislation, determined by the department hereinafter created, upon the basis of the relation which the risk involved bears to the risks classified in section 4." Plaintiff in error assumes that this sentence of the act provides for an arbitrary classification without review by the courts. The contrary is true. True, the Commission makes the original order, but the statutory rule (upon the basis of the relation, etc.)

is to be followed by the Commission, and any employer (under the provisions of section 20), if he feels aggrieved, may appeal to the courts.

Section 3 of the act is devoted largely to definitions. Plaintiff in error (Brief, page 5, paragraph 5) criticises the provision therein that if a workman covered by the act be injured while away from the plant of his employer by reason of the negligence of another not in the same employ the injured workman may elect to take under the act or seek his remedy against such other, and if he take under the act his cause of action against such other shall be assigned to and may be enforced by the state for the benefit of the accident fund. The criticism overlooks the fact that risks which a workman incurs while in the performance of his duty away from the plant of the employer are risks incident to the employment and the industry. The purpose of the provision is to provide certain compensation to the workman for an injury sustained by him in the course of his employment, and incidental thereto, and at the same time to preserve to the workman or to the fund of his class any opportunity of recoupment from a third party.

Section 4 classifies the industries covered by the act, fixing a certain percentage of the total payroll of each industry varying in amount with the estimated degree of risk, and provides for the payment of the same into an accident fund thereby created.

The initial payments cover the period between October 1, 1911, and January 1, 1912. The schedule fixed in the section is merely tentative, it being provided that any class having sufficient funds credited to its account at the end of the first three months, or any month thereafter, to meet the requirements of the accident fund, shall not be called upon for such month. It is declared to be the purpose of the section that the fund shall ultimately become neither more nor less than self-supporting, exclusive of the expenses of administration. Provision is made for advances in classification and premium rates in case it is shown by experience that because of poor or careless management any establishment or work is unduly dangerous in comparison with other like establishments or works. It is further provided that each class of industry shall meet and be liable for the accidents occurring in that class, and that no class shall be liable for the depletion of the accident fund from accidents happening in any other class. The act only applies to workmen employed in extra hazardous employments, and if any establishment or work comprises several occupations listed in different risk classes the premium is computed according to the payroll of each occupation if clearly separable; "otherwise an average rate of premium will be charged for the entire establishment, taking into con-

sideration the number of employees and the relative hazards."

Plaintiff in error, at page 7, paragraph 8, of its brief, criticises the provision in section 4 of the act, which provides: "If, after this act shall have come into operation, it is shown by experience under the act, that because of poor or careless management any establishment or work is unduly dangerous in comparison with other like establishments or works, the department may advance its classification of risks and premium rates in proportion to the undue hazard."

The criticism is based upon the erroneous thought that the determination is left to the discretion of the department. This can not be so, because the act (as quoted) prescribes a rule to be followed, "in proportion to the undue hazard"; that is to say, as the hazard in the particular plant exceeds the hazard in other like plants or works.

If upon proper investigation the disproportion of hazard is ten per cent, the increase of rate must be ten per cent. Such a question is one having to do with "the proper application of the provisions of this act," and as such subject to court review at the instance of any employer. See section 20. It is not a matter resting in discretion, but one of proceeding under a prescribed rule or principle.

Plaintiff in error, in paragraph 9, page 7, of its brief, criticises the provision of section 4, above quoted, viz.: "otherwise an average rate of premium," etc., on the theory that the Commission may exercise an arbitrary discretion and thereby work injustice between different classes. This overlooks the language of the act wherein a rule is laid down for the Commission to follow in striking an average rate where the classes are not clearly separable. The determination of the Commission in any such case may be appealed from by any employer, whether directly or indirectly affected. It would be as reasonable in any such cases to assume that the court on review would misapply the rule laid down by the statute as to assume that the Commission would disregard it.

Section 5 establishes a detailed schedule of compensation for all cases of injury or death to workmen falling within the provisions of the act, and provides that such compensation shall be in lieu of any and all rights of action whatsoever against any person.

The first criticism of plaintiff in error of this section (Brief, page 8, paragraph 10) is devoted to the question of the legislative policy of the act. A sufficient answer to this would seem to be that the wisdom or expediency of this act is a matter solely for the legislature and not for the court. The legislative

policy of Washington, however, is that the size of the family of an injured workman shall increase the award in his case rather than his skill, length of employment or rate of wage, a choice of policy easily defended on principle, were the question a judicial one.

The next criticism of this section (Brief, page 8, paragraph 11) is based upon a plain misconception of the provisions of the act. In the matter referred to the Commission may not act arbitrarily. It has to determine questions of fact. Its determination is subject to review on the appeal of the employer, employee, or any other person feeling himself aggrieved. See section 20 of the act.

Section 6 provides that if the injury is intentionally inflicted by the workman upon himself he shall be entitled to no compensation out of the accident fund, whereas if the injury is intentionally inflicted by the employer, the workman takes under the act and may also sue the employer for any damage suffered in excess of the amount received or receivable under the act.

The criticism of this section (Brief, page 9, paragraph 12) is based upon a misunderstanding or misreading of this provision of the act. Where it is claimed that the employer intentionally produced the injury the Commission has nothing to do with

the matter. The injured workman receives his compensation under the act, and if he wishes to pursue his employer further he may do so by action at law, his recovery being limited to the amount of damage in excess of the allowance received or receivable under the act.

Section 7 provides for the conversion of the monthly payments provided for in section 5 into a lump-sum payment in the discretion of the department.

Section 8 relates to recoveries against employers who default in their payments, after demand.

Plaintiff in error (Brief, page 9, paragraph 13) again misconstrues the act. The provisions in regard to suit at law against the employer who is in default in his payments under the act do not apply to those employers who are delinquent, but only those delinquent employers who have failed to pay after demand made upon them. In such cases the defenses of fellow servant and assumed risk are abolished, and the doctrine of comparative negligence established, whether the action be brought by the employee or by the state.

Sections 12, 13 and 14 cover the filing of claims for compensation, the medical examination of the workman and the notices of accident by the employer.

Section 15 relates to the examination of the books of employers, and section 16 provides the penalty for misrepresentation.

Section 17 extends the provisions of the act to public work.

Section 18 relates to employees engaged in interstate commerce.

Section 19 permits the elective adoption of the benefits of the act by those not engaged in extra hazardous employments.

Section 20 governs the court review of decisions of the department.

Section 21 creates the industrial insurance department.

Section 24 defines certain duties of the department.

Section 26 prescribes the manner in which the funds shall be disbursed.

The other sections of the act cover matters of administrative detail.

Summarized, the act provides for the collection of a fund from each class of extra hazardous industry, and the distribution of that fund by the state through its industrial insurance department to workmen injured in the scope of their employment in the industries enumerated; and this regardless of any question of negligence, contributory negligence, fellow serv-

ant or assumption of risk. It provides for care and compensation of those injured and their dependents, while limiting the expense to the employer and at the same time distributing the burden upon the whole industry, the state contributing toward the cost of operation in proportion to the public gain from the new system.

As stated by the supreme court of the state in the case of *State ex rel. Davis-Smith Co. v. Clausen,* 65 Wash. 156-175:

"It is founded on the basic principle that certain defined industries, called in the act extra hazardous, should be made to bear the financial losses sustained by the workmen engaged therein through personal injuries, and its purpose is to furnish a remedy that will reach every injury sustained by a workman engaged in any of such industries, and make a sure and certain award therefor, bearing a just proportion to the loss sustained, regardless of the manner in which the injury was received."

ARGUMENT AND AUTHORITIES.

In their brief, counsel for plaintiff in error invoke the protection of three provisions of the Constitution of the United States, viz.: Sec. 4, of Art. IV, the seventh amendment, and the fourteenth amendment.

REPUBLICAN FORM OF GOVERNMENT.

It is contended that the law violates section 4 of article IV of the Constitution of the United States, guaranteeing to the states a republican form of government. Whether or not a state has ceased to be republican in form within the meaning of this guaranty or the Constitution of the United States is not a judicial question, but a political one, which is solely for Congress to determine.

Pacific States Telephone & Telegraph Co. v. Oregon, 223 U. S. 118.
Kiernan v. Portland, 223 U. S. 151.

DUE PROCESS OF LAW.

Professor Freund, speaking of the origin of this constitutional provision, says:

"The guaranty that no person shall be deprived of life, liberty or property without due process of law may be traced to the great charter and was originally intended as a safeguard against the arbitrary and despotic exercise of executive power, and not against legislation. The same meaning was probably attached to it by the framers of our first constitutions. Not that arbitrary acts depriving an individual of life,

liberty or property had never taken the form of statutes; parliament on the contrary had frequently been made the instrument of despotism; but these abuses were guarded against by special constitutional prohibitions: the prohibition of acts of attainder, the provision that private property must not be taken for public use without compensation, and that the obligation of contracts must not be impaired. An act of legislation taking life, liberty or property and not covered by either of these clauses was probably not thought of when the first constitutions were framed."

"At the present time, however, the idea of due process is freely applied to legislation, and means with regard to it 'conformity to the settled maxims of free government.' "

Freund, Police Power, sec. 20.

This court has repeatedly declared that the limitations contained in the fourteenth amendment to the Federal constitution were not designed to limit or in any way interfere with the exercise of the state's police power.

Barbier v. Connolly, 113 U. S. 27.
Jones v. Brim, 165 U. S. 180.
L'Hote v. New Orleans, 177 U. S. 587.
Cunnius v. Reading School District, 198 U. S. 458-469.

The expression of Field, J., in *Barbier v. Connolly, supra,* is typical (Op. p. 31):

"But neither the amendment (the fourteenth amendment)—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the

people and *to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.*"

The police power has been variously defined. We quote here a few of the expressions of this court:

"When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. * * * From this source come the police powers, which, as was said by Chief Justice Taney in *The License Cases,* 5 How. 583, 'Are nothing more or less than the powers of government inherent in every sovereignty, that is to say, the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good." (Waite, C. J., in *Munn v. Illinois,* 94 U. S. 113, 124).

"But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. * * *

"For the pursuit of any lawful trade or business the law imposes similar conditions. Regulations respecting them are almost infinite, varying with the nature of the business." (Field, J., in *Crowley v. Christianson,* 137 U. S. 86, 89).

"The police power is not subject to any definite limitations, but is co-extensive with the necessities of the case and the safeguard of the public interests." (Brown, J., in *Camfield v. U. S.,* 167 U. S. 518, 524).

"We hold that the police power of the state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety." (Harlan, J., in *C. B. & Q. Ry. Co. v. Illinois,* 200 U. S. 561, 592).

The term police power has sometimes been used in a narrow sense, embracing merely regulations for the preservation of the order, peace, health, morals and safety of the community. More recently, however, it has been extended to include all legislation looking to the well-being of society in its economic and intellectual aspects.

McGehee on Due Process of Law, p. 301.

Furthermore, the police power of the state is not and cannot, in the very nature of things, be a fixed or inelastic quantity. Changed economic and industrial conditions demand corresponding regulative and protective legislation, and such legislation is upheld by the courts where it is reasonable, and intended to promote and conserve the health, morals or welfare of the people, and where it is designed to promote the general prosperity and to increase the industries of the state. During the early period of our industrial development, when industries were few and dangerous machinery unknown, protective statutes such as we now have concerning the use of machinery, laws regulating the hours of labor and restricting certain trades, occupations and professions would have been deemed a violent usurpation of fundamental constitutional rights.

This court, in the case of *Holden v. Hardy*, 169 U. S. 366, 387, referring to changes made by state statute from existing common law conditions, said:

"They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into confiict with the supreme law of the land.

"Of course, it is impossible to forecast the character or extent of these changes, but in view of the fact that, from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, *and, particularly, to the new relations between employers and employes, as they arise.*"

The language above quoted emphasizes the changing attitude of courts towards social legislation. The change does not involve the change of any constitutional principle, but merely means the shifting of the emphasis from one element to another. In other words, the courts formerly, under different social, economic and industrial conditions, emphasized the constitutional guaranty of the contractual freedom and strict property rights of the individual. Now the

tendency is to give increased recognition to the limitations of that freedom which modern considerations of public welfare require.

Let us next consider the restrictions placed upon the police powers of the State by the due process clause.

In *Gundling v. Chicago,* 177 U. S. 183, 188, this court said:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, *and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference.*"

In *McLean v. Arkansas,* 211 U. S. 539, 547, this court used the following language:

"The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is *unmistakably and palpably in excess of legislative power*" (citing cases).

"If the law in controversy has a reasonable relation to the protection of the public health, safety or *welfare,* it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose, or because it is thought to be an unwise exercise of the authority vested in the legislative branch of the Government."

On this point, in the case of *Atkin v. Kansas,* 191 U. S. 207, 223, this court, speaking through Mr. Justice Harlan, said:

"So, also, if it be said that a statute like the one before us is mischievous in its tendencies, the answer is that the responsibility therefor rests upon legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and, upon grounds merely of justice or reason or wisdom, annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution."

In the case of *Hurtado v. California,* 110 U. S. 516, Mr. Justice Matthews reviews exhaustively the origin and meaning of the phrase "due process of law." In this case, the court was considering whether procedure by information in criminal cases

was due process of law. The appellant, relying upon the language of Mr. Justice Curtis in *Murray v. Land etc. Co.*, 18 How. 273, where he stated that, in order to ascertain whether due process of law exists, "we must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country," argued that this furnished an indispensable test of what constitutes "due process of law." The court, answering this contention, says (Op., p. 528):

"But this inference is unwarranted. The real syllabus of the passage quoted is, that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows, that nothing else can be due process of law. The point in the case cited arose in reference to a summary proceeding, questioned on that account, as not due process of law. The answer was: however exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land and, therefore, is due process of law. But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be

to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."

In the case of *Twining v. New Jersey,* 211 U. S. 77, 100, this court said:

"This court has always declined to give a comprehensive definition of it (the fourteenth amendment), and has preferred that its full meaning should be gradually acertained by the process of inclusion and exclusion in the course of decisions of cases as they arise. * * * From the consideration of the meaning of the words in the light of their historical origin this court has drawn the following conclusions: * * *"

"Second. It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight jacket, only to be unloosed by constitutional amendment. That, said Justice Matthews, in the case *Hurtado v. California,* 110 U. S. 516, 529, 'would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.'"

As illustrating this proposition, we also refer to the decisions of this court in the following cases:

Otis & Gassman v. Parker, 187 U. S. 606.
Powell v. Pennsylvania, 127 U. S. 678.
Booth v. Illinois, 184 U. S. 425.
Schmidinger v. Chicago, 226 U. S. 578.
Central Lumber Co. v. Dakota, 226 U. S. 157.
Rosenthal v. People, 226 U. S. 260.
Jacobsen v. Mass. 197 U. S. 11.
Erie Ry. Co. v. Williams, 34 Sup. Ct. 761.

Bacon v. Walker, 204 U. S. 311.
M., K. & T. Ry Co. v. May, 194 U. S. 267.
Austin v. Tenn., 179 U. S. 343.
Halter v. Nebraska, 205 U. S. 34.
Knoxville Iron Co. v. Harbison, 183 U. S. 13.
Noble State Bank v. Haskell, 219 U. S. 104.
Murphy v. People, 225 U. S. 623.
Patsone v. Penn., 232 U. S. 138.
German Alliance Ins. Co. v. Lewis, 233 U. S. 389.
Kansas City Ry. Co. v. Cade, 233 U. S. 642.
C., B. & Q. Ry. Co. v. McGuire, 219 U. S. 549.
Welch v. Swazey, 214 U. S. 91.
Watson v. Maryland, 218 U. S. 173.
Petit v. Minnesota, 177 U. S. 164.

The legislature may not, under the guise of the police power, arbitrarily, by its mere fiat, enact legislation without regard to the public good. Every merely arbitrary and capricious act of the legislature is out of place in a "government of laws and not of men," and is irreconcilable with the conception of due process of law.

McGehee on Due Process of Law, p. 306.

The true criterion by which to determine whether any exercise of legislative power is violative of the due process of law clause is that of reasonableness as distinguished from arbitrary or capricious action.

Before considering the particular objections made to the act it is not inappropriate to refer briefly to the conditions existing at the time of the adoption of

the act and the evils resultant from the system of employer's liability.

(a) It has been variously estimated that from fifty to sixty-five per cent. of the injuries in modern industrial occupations are due entirely to the inherent risk of the industry; that is, this percentage of all injuries is produced by causes other than the negligence of the employer, the employe or the fellow servant. These injuries occur, and will continue to occur, regardless of any human agency, and the burden of them under the present system falls almost entirely upon the workman or those dependent upon him. Thus the burden falls upon those who are able to bear it least.

(b) Even where a legal liability against the employer exists, the recovery for injuries is made difficult by the technicalities of the law. In fact, in most cases where legal liability exists, the recovery is more a matter of accident than of legal right. The affirmative defenses of fellow servant, contributory negligence and assumption of risk have been refined until they are mere legal niceties. Recovery depends largely upon the court, different rules prevailing in the state and federal courts; upon the circumstance of location, different rules prevailing in different states; upon the legal talent employed; and upon the ability of the workman to obtain the funds necessary to prosecute expensive litigation.

(c) On the other hand the burden on the employer must not be overlooked. While the average recovery is remarkably low (it has been estimated at less than five hundred dollars in cases of death), nevertheless it is a matter of common knowledge that in many instances juries, swayed by sympathy, have rendered grossly excessive verdicts. Falling, as they do, entirely on a single employer, the possibility of these judgments produces constant apprehension of financial disaster. A single verdict may seriously impair the entire capital of the employer, or, worse, result in bankruptcy. In the latter case the employer loses his capital and the workmen their employment. Thus the entire producing unit is, for the time being at least, destroyed, and the State suffers accordingly.

(d) Under these conditions it is apparent that only the largest industrial establishments can carry the risk of loss incident to industrial accidents, and common prudence requires that the risk be insured in some form. Under this system there has grown up a form of insurance known as employers' liability insurance. It is the business of the makers of such insurance to indemnify the employer against loss by industrial accident.

The economic waste of such a system is enormous. Of the vast sums expended in this country on account of industrial accidents but a small portion ultimately

finds its way to the hands of those upon whom the burden falls.

It should be remembered that the insurance company receives its compensation, not to pay the injured workman, but to defeat a recovery against the employer. Consequently, aside from the expense of administering the affairs of the company, most of the remainder goes to pay attorneys' fees, court costs and witnesses. This is equally true of the amount awarded to the injured workman through litigation.

In addition, personal injury litigation in cases of master and servant consumes a large part of the time of our courts, and the cost of maintaining the courts, with the attendant juries, is a direct burden upon the taxpayer.

On the other hand we have that class of cases in which a verdict is grossly disproportionate to the injury.

(e) It is obvious that conditions such as described above can only produce the utmost antagonism between the employer and the employe. The moment the accident occurs, each must regard his own interests, and the employer often the interests of his insurer. Constant friction is thus engendered, which, in itself, is extremely detrimental to society. The employer and the workman, although in theory equal before the law, are not upon an equality. The one is rich

and powerful; the other ordinarily without means except to supply his immediate needs. This very inequality tends to foster antagonism.

(f) Finally, there follows the burden inflicted upon society by the present system. In the first place, the vast amount of money paid by the employer to indemnify him against loss in case of accident is naturally and necessarily borne by the community as a part of the cost of the product. Furthermore, and inasmuch as only a small per cent. of this money reached the injured workman or his dependents, in the great majority of cases the injured workman or his dependents became a charge upon society. Therefore society necessarily, under the present system, assumed the double burden, first, of paying the cost of the employers' insurance and, second, of caring for the injured workmen and their families.

An investigation of almost any one of the thousands of work accidents which occur annually in the United States shows the extremities to which injured wage-earners and their families are put. Children are kept from school and forced into unhealthy and often demoralizing employment in factories and on the streets. Widows, unskilled in any occupation even fairly remunerative, are compelled to resort to every manner of means to earn enough to insure at most an existence devoid of comfort or pleasure. Wives slave

under the most trying circumstances to maintain the family, with the father and husband lying invalided or injured at home. And all this in the face of the vast sums expended—not for the compensation of these—but to defeat what all acknowledge to be due.

If the act under consideration has a legitimate and proper end beneficial to the state, and does not arbitrarily or unduly oppress any person, then clearly under the above authorities it is within the legislative power. Its purpose is to substitute for the old system of employers' liability (so many times the subject of legislative action) a newer and better system which shall place upon each industry a part of the burden of caring for the workmen and their dependents injured in that industry. Like every employers' liability act its main purpose is to keep the injured workmen from being a burden on society at large or on public charity. If that purpose is not an appropriate or proper one, then every act regulating employers' liability by increasing it is improper.

We quote the language of the state court in its opinion sustaining the validity of the act. (*State ex rel. Davis-Smith Co. v. Clausen,* 65 Wash. 156-195).

"That the statute here in question has the attribute of reasonableness, rather than that of capriciousness, seems incontrovertible. The evil it seeks to remedy is one that calls loudly for action. Accidents to workmen engaged in the industries enumerated in it are all but inevitable. It seems that no matter how carefully

laws for the prevention of accident in such industries may be framed, or how rigidly they may be enforced, there is an element of human equation that enters into the problem which cannot be eliminated and which invariably causes personal injuries and consequent financial losses to workmen engaged therein. Heretofore these losses have been borne by the injured workmen themselves, by their dependents, or by the state at large. It was the belief of the legislature that they should be borne by the industries causing them, or, perhaps more accurately, by the consumers of the products of such industries. That the principle thus sought to be put into effect is economically, sociologically, and morally sound, we think must be conceded. It is so treated by the learned counsel who have filed briefs in support of the auditor's contentions; it is so conceded by all modern statesmen, jurists, and economic writers who have voiced their opinions on the subject; and the principle has been enacted into law by nearly all of the civilized countries of Europe, by Australia, by New Zealand, by the Transvaal, by the principal provinces of the Dominion of Canada, and, in a partial form at least, by one or more of South American republics. Indeed, so universal is the conception that to assert to the contrary is to turn the face against the enlightened opinion of mankind. The common law does not purport to afford a remedy for the condition here found to exist. It affords relief to an injured workman in only a limited number of cases; cases where the injury is the result of fault on the part of the employer and there is want of fault on the part of the workman. For the greater number of injuries traceable to the dangers incident to industry, no remedy at all is afforded. The act, therefore, having in its support these economic and moral considerations, is not unconstitutional for the reasons suggested upon this branch of the argument."

In *Muller v. Oregon,* 208 U. S. 412, the question of the constitutionality of an act limiting the hours of

labor of women employed in certain industries was under discussion. It was contended that the Oregon statute violated the fourteenth amendment to the Federal constitution. In that case counsel for the state, in their brief, collated both foreign and state legislation on the subject, together with the expressions of opinion as to the expediency of and necessity for such legislation, from lawyers, economists, labor bureaus and students of social and industrial problems. In sustaining the constitutionality of the act, Mr. Justice Brewer, commenting upon the state of public opinion with reference to the necessity of such legislation and the effect to be given to the same, says (p. 419):

"In patent cases counsel are apt to open the argument with a discussion of the state of the art. It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation, as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis, for the defendant in error, is a very copious collection of all these matters, an epitome of which is found in the margin.

"While there have been but few decisions bearing directly upon the question, the following sustain the constitutionality of such legislation: *Com. v. Hamilton Mfg. Co.,* 120 Mass. 383; *Wenham v. State,* 65 Neb. 394, 400, 406, 58 L. R. A. 825, 9 N. W. 421; *State v. Buchanan,* 29 Wash. 602, 59 L. R. A. 342, 92 Am. St. Rep. 930, 70 Pac. 52; *Com. v. Beatty,* 15 Pa. Super. Ct. 5, 17; against them is the case of *Ritchie v. People,* 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454.

"The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long-continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."

In his opinion in *Noble State Bank v. Haskell*, 219 U. S. 104, Holmes, J., regards "prevailing morality or strong and preponderant public opinion" as entitled to consideration in the determination of the question of the validity of social legislation. Under this division of our brief we shall therefore consider briefly the legislation of other countries and the progress made in the United States.

Of all civilized nations the United States has been the last to attempt to solve the question of compensation for industrial accidents. Great Britain awoke to the intolerable evils of the system more than thirty

years ago. In 1880 a somewhat ineffectual attempt was made to ameliorate conditions. In 1897 the first radical step was taken by the passage of the Workmen's Compensation Act. This act, as its name implies, abolished the nice balancing of the relative liability of the employer and the employe and of assumption of risk, recognizing, not the liability of the employer, but the liability of the industry. This act applied only to the more hazardous occupations, but the number was materially increased from time to time by amendment. In 1906 a law based on the report of a parliamentary commission was enacted extending the application of the earlier law to substantially all workmen. Under this act the workman is entitled to recover for all industrial accidents not caused by his serious or willful misconduct. Its provisions even extending to certain scheduled diseases, such as anthrax, lead or phosphorous poisoning, which are deemed accidents within the meaning of the law.

The industrial progress of Germany during recent years has been surpassed by that of no other nation. Prussia was the first European nation to recognize the principle of the liability of employers in case of industrial accidents regardless of negligence. After the unification of the Empire the subject of industrial or social insurance received more attention, and with the active encouragement of the emperor and his

chancellor, Bismarck, a comprehensive system of workmen's compensation was inaugurated. Several liability laws have been passed in Germany: the first in 1884 and the last in 1900, the latter representing a codification of all prior enactments. The German system is so interwoven with sick benefits and old-age pensions that it is difficult of description in a simple statement. Enough to say that every employer and every employe must insure against accident in a state-conducted insurance company, the employers carrying more of the burden than the employes, and that the victim of an industrial accident, whether it result in temporary disability, permanent disability, or death, receives compensation on a fixed scale immediately and automatically. The payments are considered a tax on the industries.

The systems in force in European countries differ widely. In Norway, for instance, a fund raised by the enforced contribution of industries is administered by the state. In Italy the employer has the option of insurance in the national industrial insurance institution, an authorized insurance company or in a mutual association of employers. While differing in detail from the law of England, where the risk is borne by a single employer, to the system of Norway, where the fund is administered by the state, the principle is the same, namely, that each industry shall

bear the burden of loss through its industrial accidents.

A complete summary of foreign legislation will be found in Appendix "A."

During the last few years the question of workmen's compensation has been the subject of much discussion in the legal, economic and industrial circles of this country. At the close of the year 1914, twenty-four states had passed laws designed in one form or another to remedy the evils inherent in the old system of employers' liability. Citations to these acts will be found in appendix "B." In five states, viz.: California, Maryland, New York, Ohio and Washington "compulsory" workmen's compensation acts have been adopted, while in the other states acts providing for the "elective" system have been passed.

Liability Without Fault.

Having considered the general requirements of the due process of law clause as applied to police power, and the conditions which the act seeks to remedy, we will next take up the validity of the act as to the particular individuals falling within its terms: first, the validity of the imposition of liability upon the employer where he is without fault; second, the validity of the imposition of such liability upon employers collectively, that is, upon the industry, and, third, the validity of the act as to the employe.

The act proposes to place (indirectly) upon the employer engaged in extra hazardous operations the burden of all accidents to his employes. The causes of action for injury to workmen recognized in present-day law involve negligence of either: (a) the employer; (b) a fellow employe; (c) the employer, that of the injured employe contributing, i. e., combined negligence; (d) the doctrine of assumed risk; (e) the employe, or (f) risks inherent in the industry.

For (a) the burden is already upon the employer.

The power of the legislature to abolish the doctrine of fellow servant (b) is beyond question.

Jeffrey Mfg. Co. v. Blagg, U. S. Adv. Sheets, No. 5, p. 167, decided Jan. 5, 1915.

Second Employers' Liability Cases, 223 U. S. 1.

Mobile etc. R. R. Co. v. Turnipseed, 219 U. S. 35.

(c) It was also a like defense that the negligence of the injured employe contributed even slightly to the injury. In some jurisdictions the legislatures, in others the courts, have modified the rigor of this defense.

In courts of admiralty such a division of damages in cases of combined negligence has been the rule for years as between ships.

It seems clear that the whole subject is within the legislative power.

Jeffrey Mfg. Co. v. Blagg, U. S. Adv. Sheets, No. 5, p. 167, *supra.*

Second Employers' Liability Cases, 223 U. S. 1, *supra.*

El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87.

The Employers' Liability Cases, 207 U. S. 463.

(d) It is within the power of the legislature to abolish the defense of assumed risk.

Jeffrey Mfg. Co. v. Blagg, U. S. Adv. Sheets, No. 5, p. 167, decided January 5, 1915.

Second Employers' Liability Cases, 223 U. S. 1.

In those states which have adopted the so-called "elective" workmen's compensation laws it is uniformly held that the legislature may abolish the defenses of (b) fellow servant, (c) contributory negligence, and (d) assumed risk.

Borgnis v. The Falk Company, 147 Wis. 327.
State ex rel. Yaple v. Creamer, 85 Ohio St. 349.
Deibeikis v. The Link-Belt Co., 261 Ill. 454.
Opinion of Justices, 209 Mass. 607.
Sexton v. Newark District Telegraph Co., 84 N. J. Law, 85.
Matheson v. Minneapolis Street Railway Co., 126 Minn. 286.
Shade v. Ash Grove Portland Lime & Cement Co., 144 Pac. (Kan.) 249.

This brings us to a discussion of (e) and (f), the question in each being whether the due process

clauses prevent the imposition of liability upon the employer in those cases where he is without fault or blame.

So far as (e) is concerned, the intentional wrong of the employe is to be first eliminated, for the act (section 6) eliminates it. There are left under this heading cases where, through momentary distraction or inadvertent miscalculation, induced probably frequently by the physical or mental fatigue of the workman, accidental injury comes to the workman without any intention or moral fault of his own. Such cases are everywhere recognized as inevitable, as a necessary hazard of the work, as certain to happen as the machinery to break.

Under (f) fall the remaining cases, that is, those injuries caused by risks inherent in the industry.

And there is no difference in principle between the abrogation of the fellow servant rule and the liability of the employer for injuries caused by risks inherent in the industry. As Senator Sutherland, chairman of the Federal Employers' Liability Commission, tersely puts it, in the one case the master is held responsible for the fault of a dangerous agent and in the other for the fault of a dangerous agency.

"Negligence," as the term is used today, had no place in the primitive German law. No inquiry was made into that question and no rule was based on the

presence or absence of design or intent. This subject is fully treated by Mr. Whigmore in his Essay on Legal Responsibility for Tortious Acts: Its History, 3 Select Essays on Anglo-American Legal History, p. 474 *et seq.*

The rule was that "in all civil acts the law doth not so much regard the intent of the actor as the loss and damage of the party suffering" (Id., p. 504).

The marks of the absolute liability of the early common law in trespass are still found in American jurisprudence. As late as 1865 Chief Justice Denio, of the New York court of appeals, adhered to the view that one directing the discharge of a firearm was liable for the resultant injury to a bystander, even though the injury was purely accidental. *Castle v. Duryee,* 2 Keys (N. Y.) 169.

Other instances are found in the liability of lunatics and infants for torts, the liability for "failing to keep in his fire" (which was abolished by statute in 1712), the liability of the owner of wild animals, the liability of the owner for damages done by his escaping cattle, the responsibility of the husband for the torts of his wife, the keeping of gunpowder at peril, and forfeiture of the chattel responsible for injury to the crown as a deodand. (3 Select Essays on Anglo-American Legal History, p. 509 *et seq.;* and

Street, Foundations of Legal Liability, vol. 1, pp. 52-59).

Even in the latter half of the 1800's it was found necessary for the English courts to review the cases, and the doctrine was finally established that due care on the part of the defendant may be (but is not necessarily) a defense. (*Holmes v. Mather,* 1875; *Stanley v. Powell,* 1891, 3 Select Essays on Anglo-American Legal History, p. 507).

We have shown that liability without fault was general in the early English law. The tendency has been to restrict the liability to cases of negligence rather than to extend the doctrine of negligence. We deem it necessary to review somewhat in detail the cases where it has been held that liability may be imposed upon one who is in no manner at fault, and those in which it has been held that the imposition of such liability is not inhibited by the due process of law clause.

We call attention to these cases for the purpose of showing that the whole question of liability of the employer for injuries to his servant is subject to regulation by law, and that there is nothing new or contrary to our constitutional provisions in the principle of an act imposing liability upon the master for injuries occurring without fault or negligence on his part.

It is an ancient law of the admiralty that a seaman falling sick or becoming wounded in the service of the ship is entitled to be maintained and cured at the expense of the ship. This rule is almost identical with the proposition under discussion. Under the act a workman is entitled to compensation only for injuries occurring in the course of his employment.

In the case of *The Osceola,* 189 U. S. 158, it was held that under the laws of admiralty the vessel and her owners are liable in case a seaman falls sick, or is injured in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least as long as the voyage is continued.

This right constitutes, in the general maritime law, a part of the contract of wages, and is a material element in the compensation for his labor and services, as is his right to receive subsistence.

Curtis, Merchant Seaman, 106.

So, by the provisions of the act under consideration, the right to compensation of a workman injured by accident in the course of an extra hazardous employment is now made part of the law of the service, just as much as the right of the seaman to be cured at the ship's expense, and just as much as formerly was the assumption by the servant of all the ordinary risks of personal injury without negligence of his employer. Nor can it be said that the above principles

regarding seamen, as laid down by the supreme court, are contrary to the provisions of our constitution, and are therefore applicable to the admiralty alone. For the supreme court in the same case has laid down the following rule in regard to the administration of the admiralty law:

"As the admiralty law upon the subject must be gathered from the accepted practice of courts of admiralty, both at home and abroad, we are bound in answering this question to examine the sources of this law and its administration in the courts of civilized countries, and to apply it, so far as it is consonant with our own usages and principles, or, as Justice Bradley observed in *The Lottawanna,* 21 Wall. 558, 'having regard to our own legal history, *constitution,* legislation, usages and adjudications.'"

The Osceola, 189 U. S. 158, 168.

If congress were to pass a law abolishing the doctrine that the ship is responsible for the care of its injured seamen, a principle which the decisions above referred to establish to have been a part of the maritime law at the time of the adoption of the constitution, and adopted by the constitution into the national law, could a seaman receiving injury on ship after the enactment of such legislation successfully contend that the due process clause of the constitution had been violated to his injury by such enactment?

Or, if legislation had been directed the other way—that is to say — had increased the responsibility of the ship and shipowner to such injured seaman, could

the shipowner successfully contend that his constitutional rights had been invaded?

The case of *Heeg v. Licht,* 80 N. Y. 579, was an action for damages for injuries to buildings alleged to have been caused by the explosion of a powder magazine on the premises of the defendant.

The New York court of appeals, speaking through Mr. Justice Miller, said (Op., p. 581):

"The fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree of care and vigilance, evinces its dangerous character and might in some localities render it a private nuisance. In such a case the rule which exonerates a party engaged in a lawful business, when free from negligence, has no application. The keeping or manufacturing of gunpowder or of fireworks does not necessarily constitute a nuisance *per se.* That depends upon the locality, the quantity, and the surrounding circumstances and not entirely on the degree of care used. In the case at bar it should have been left for the jury to determine whether * * * the defendant was chargeable with maintaining a private nuisance and answerable for the damages arising from the explosion."

It is quite true that the Heeg case and the cases cited therein were all cases of nuisance, but there is no magic in the word "nuisance"; it is merely the term of art used by the courts to designate certain annoying dangerous uses of property as to which the common law prescribes that the owner shall be responsible in damages without proof of negligence and although the business conducted be otherwise lawful.

The doctrine of nuisance is the application of the common-law doctrine *sic utere tuo* in terms of a rule of liability. If the common law can prescribe that the use of explosives shall create liability for the inherent result, in what way can it be said to be incompetent for the legislature to place a limited liability for the same trade risk upon the statute books as they have in the case under consideration?

Again, in the famous case of *Fletcher v. Ryland, L. R.*, 3 H. L. 330, the defendant collected water on his land in a reservoir, a thing which he had a lawful right to do. He was held responsible for the damages caused by the escape of that water without negligence. That case, decided in 1868, was based solely upon the theory of responsibility of one who introduces the dangerous instrumentality into the community.

In the case of *Thomas v. Winchester*, 6 N. Y. 397, it was decided that a vendor of certain dangerous drugs was liable for the ultimate damage caused by those drugs to persons for whom they were not intended.

All these cases are examples of the common-law application of the doctrine *sic utere tuo*. They are, in effect, the establishment by the common-law in terms of rules of liability of wise regulation of the public health and safety. In form and purpose they do not differ from the liability created by the act we are now considering. They are all rules of liability placed

upon persons engaged in dangerous or obnoxious, though otherwise legal, pursuits. They serve to emphasize the fallacy of the oft-repeated argument that liability cannot be imposed without fault. That doctrine must be qualified by the further proposition that the common law recognizes responsibility, though without fault, on the introducer into the community of a dangerous substance or dangerous tools. Since that is so, the whole question of "due process" necessarily resolves itself into a question of degree—a question of whether it is arbitrary or capricious for the legislature to regulate the status of extra hazardous employment and whether the regulation is unduly oppressive.

As hereinbefore stated, at the common law a man was absolutely responsible for damages done by his escaping cattle, no matter how careful he may have been in keeping them, and this doctrine finds support in the early cases of this country.

R. R. Co v. Munger, 5 Denio 255.
Wells v. Howell, 19 Johnson (N. Y.) 385.
Noyes v. Colby, 30 N. H. 143.
Wagner v. Bissell, 3 Iowa 396.
R. R. Co. v. Rollins, 5 Kan. 98.

Of dangerous, inanimate objects for which a man is held responsible, fire was the first to come under the notice of the courts and the action on the case on the custom of the realm for damage done by this

agent is very ancient. So strict was the common-law rule of liability here that the fact that fire was purely accidental was no defense. A man was liable where the fire was due to the act of his servant or even of a guest.

Street, Foundations of Legal Liability, v. 1, p. 56.

In cases of damage from explosions it was no defense that lightning caused the explosion.

Street, Foundations of Legal Liability, v. 1, p. 59.

So, one who for a lawful purpose, and without negligence or want of skill, explodes a blast on his own land and thereby causes a piece of wood to fall upon a person traveling in a public highway is liable as a trespasser for the injury thus inflicted, and in an action brought against him for damages by reason of the death of the person injured it is not essential for the plaintiff to establish negligence or want of skill in order to make out a cause of action.

Sullivan v. Dunham, 161 N. Y. 290.

A similar liability existed for damage done by wild or vicious animals.

Street, Foundations of Legal Liability, v. 1, p. 55.
Muller v. McKesson, 73 N. Y. 195.

It is true that the rigor of these principles of the common law has been modified to a greater or lesser

extent by the decisions of the courts, but if the courts may, without violating constitutional provisions, so modify the law as to bring it in consonance with a more exact justice, is it not equally true that the legislature may change rules of liability to effectuate the same purpose? The effect of the due-process of law clause is simply to prohibit legislative action not in consonance with our fundamental ideas of justice. It would seem to follow that when the legislature enacts legislation which nearly everyone concedes will result in the establishment of plain and simple justice there is no violation of the due-process of law clause.

This court, in *Railroad Company v. Zernecke,* 183 U. S. 582, in sustaining the Nebraska act making railroad companies insurers of their passengers regardless of fault, treats the statute as applying to passengers the rule of the common law applicable to freight and baggage, saying (p. 586):

"Our jurisprudence affords examples of legal liability without fault, and the deprivation of property without fault being attributable to its owner. The law of deodands was such an example. The personification of the ship in admiralty law is another. Other examples are afforded in the liability of the husband for the torts of the wife—the liability of a master for the acts of his servants."

In *Railway Company v. Emmons,* 149 U. S. 364, this court sustained the validity of a statute of the state of Minnesota which required railroad compa-

nies to fence their tracks and made them absolutely liable for stock killed and also liable for all damages sustained by any person in consequence of the failure to fence.

The law in Missouri prior to the enactment of the statute hereinafter referred to was that railroad companies were liable for fires set out by their engines only in cases of their negligence. In 1887 the legislature of Missouri passed a statute making them absolutely liable in all cases for all damages without regard to negligence. The statute came before the supreme court of the United States in *Railway Company v. Matthews,* 165 U. S. 1, being attacked upon the ground that it was an arbitrary, unreasonable and unconstitutional exercise of legislative power, imposing an absolute and onerous liability for the consequences of doing a lawful act and of conducting a lawful business in a lawful and careful manner, in which respect it was said to contravene the fourteenth amendment. The conclusion of the court, after reviewing many authorities, was thus stated (Op. p. 26):

"When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company, which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property, who has no control over or interest in those in-

struments. * * * The statute is a constitutional and valid exercise of the legislative power of the state."

In *Jensen v. Railroad Co.*, 127 N. W. (S. D.) 650, the court holds constitutional a statute making railroads absolutely liable for all fires set out and also making them liable absolutely for all injury to stock by failure to build sufficient fences and cattle guards.

The same ruling was made in *Railway Co. v. Matthews*, 174 U. S. 96 and in *Railway Co. v. Humes*, 155 U. S. 513.

It will probably be contended that the foregoing cases relating to the imposition of absolute liability on common carriers in cases in which no fault or blame is attributable to such carriers are not in point because of the admitted power of regulation of public service enterprises. This, however, is not a just criticism. The power to regulate those engaged in the service of the public rests in the police power, and where the hazard of the occupation is the same or similar no reason exists why the same or similar regulation is not justified. The fact that common carriers derive their income from the service of the public surely cannot be said to confer upon the legislature greater powers with respect to the purely private concerns of such carriers.

In *Jones v. Brim*, 165 U. S. 180, was involved the validity of a statute of Utah imposing absolute lia-

bility upon any person driving an animal over a public highway on a hillside for damages done by such animal in destroying banks, etc. It was claimed that the act was violative of the fourteenth amendment. The court said the fourteenth amendment "does not limit, nor was it designed to limit, the subject on which the police power of a state may be lawfully exerted."

The case of *Atlantic etc. R.R. Co. v. Riverside Mills,* 219 U. S. 186, is another instance of statutory imposition of absolute liability. The Carmack amendment to the Interstate Commerce Act, which in terms makes the initial carrier liable to the shipper for loss or damage to his goods, even though the loss or damage occurs on the line of another carrier, and through the negligence of such other carrier, was attacked on the ground that it violated the fifth amendment.

The act was sustained as a legitimate exercise of the legislative power.

In *St. Louis & Iron Mountain Ry. Co. v. Taylor,* 210 U. S. 281, the plaintiff, a brakeman in the employ of the defendant railway company, was killed in the course of his work, and liability was asserted under the safety appliance act of congress. The court said (p. 294):

"In the case before us the liability of the defendant does not grow out of the common law duty of

master to servant. The congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' * * * The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it."

In *C. B. & Q. R. R. Co. v. McGuire,* 219 U. S. 549, an Iowa statute abolishing the doctrine of fellow servant as to railway companies, and providing that no contract of insurance, relief, benefit or indemnity, entered into between the employer and the employee, or the acceptance of benefit therefrom, should constitute any defense to an action brought under the statute, was held not violative of the fourteenth amendment.

In the case of *Orient Insurance Co. v. Daggs,* 172 U. S. 557, this court decided that the valued policy act of Missouri, making the insurer absolutely liable for the face of the policy, was not in violation of the fourteenth amendment.

In *Wilmington Star Mining Co. v. Fulton,* 205 U. S. 60, it was held that an act creating a state mining board to examine and fix the qualifications of mine

managers and mine examiners and making it unlawful for the owner of a coal mine to employ or permit the employment of persons not holding a certificate from the board, was not in violation of the fourteenth amendment as imposing upon mine owners responsibility for the faults of such employees.

It is submitted, however, that the question of the power of the legislature to impose liability where no fault exists as well as every other question that arises in this case, is concluded by the recent opinions of this court in the cases of *Noble State Bank v. Haskell,* 219 U. S. 104, and *Chicago v. Sturges,* 222 U. S. 313. Each of these cases is an illustration of liability without fault.

In *Noble State Bank v. Haskell,* the court sustained the bank guaranty act of Oklahoma, and in *Chicago v. Sturges* the court sustained an act of Illinois making a municipality liable for three-fourths of the damage to property within its limits caused by a mob.

We quote the following from the Sturges case, p. 321:

"It is said that the act denies to the city due process of law since it imposes liability irrespective of any question of the power of the city to have prevented the violence or of negligence in the use of its power. This was the interpretation placed upon the act by the supreme court of Illinois. Does the law as thus interpreted deny due process of law? That the law provides for a judicial hearing and a remedy

over against those primarily liable, narrows the objection to the single question of legislative power to impose liability regardless of fault.

"It is a general principle of our law that there is no individual liability for an act which ordinary care and foresight could have guarded against. It is also a general principle of the law that a loss from any cause purely accidental must rest where it chances to fall. But behind and above these general principles which the law recognizes as ordinarily prevailing there lies the legislative power, which, in the absence of organic restraint may, for the general welfare of society, impose obligations and responsibilities otherwise non-existent."

The common law makes every case of master and servant turn upon some application of the doctrine of negligence. If in the legislative discretion the doctrine of negligence as betwen employer and injured employee, has proven unfitted to the remarkable increase of hazards in modern industrial life, it may be justly discarded as a test of liability and some other rule substituted in its place.

Collective Liability.

It is true that under the act some employers may at one time or another be required to pay more than the cost of accidents occurring in their establishments, while others may at one time or another be required to pay less. It would seem, however, that the cases of *Noble State Bank v. Haskell,* 219 U. S. 104, and *Chicago v. Sturges,* 222 U. S. 313, are decisive of this question. In the former case the action

was brought by the Noble State Bank to prevent the state banking board from levying and collecting an assessment from the plaintiff under the banking guaranty act of Oklahoma. The act required every bank to make payment of a certain per cent. of the average daily deposits to a depositors' guaranty fund, which in case of insolvency of any bank was to be used in paying depositors. The following language of the court is peculiarly applicable here (Op. p. 110):

"There is no denying that by this law a portion of the plaintiff's property might be taken without return to pay the debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose is a private use (citing cases). And in the next it would seem that there may be other cases beside the everyday one of taxation in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. * * * At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said."

In *Chicago v. Sturges,* 222 U. S. 313, *supra,* the court had before it an act imposing liability without fault, the obligation to pay resting upon the general tax payers. It was held that such an act was a valid exercise of police power. Here we have an act im-

posing liability without fault, the obligations resting upon the employers within particular classes. Bearing in mind that the true test of an exercise of police power is the reasonableness of the particular measure, it follows that the act is not invalid unless it can be said that the imposition of the liability is arbitrary, or that the plan for distributing the burden is arbitrary. The plan of distributing the burden adopted in the Washington act, namely: the collection of premiums upon the payroll of the workmen employed, is that adopted in every state in the Union having a similar law, and by every foreign country, so far as we have been able to ascertain. It is that adopted by insurance companies handling like risks, and is everywhere recognized as a proper insurance system. Certainly, if it is within the legislative power to impose liability without fault and to distribute such liability among those within the terms of the act, the method of distribution adopted in this case must be held to be proper.

Upon this point we refer to the case of *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, where it was held that the Montana workmen's compensation law was invalid because while compulsory upon employers it was optional with the employee either to take under the act or to sue at common law for injuries resulting from the negligence of the employer. The opinion, however, is exhaustive and dis-

cusses many constitutional objections made against the Montana law. It was held that such an act as the Washington act would be within the police power of the State.

The principle involved of enforced co-operation to meet individual losses occurring in the line of business or work or risk covered by the particular legislation has been recognized in other cases.

Railroad Company v. Gibbes, 142 U. S. 386.
People v. Squire, 145 U. S. 175.
Consolidated Coal Co. v. Illinois, 185 U. S. 203.
State v. Cassidy, 22 Minn. 312.
McGlone v. Womack, 129 Ky. 274.
Mitchell v. Williams, 27 Ind. 62.
Van Horne v. People, 46 Mich. 183.
Cole v. Hall, 103 Ill. 30.
Holst v. Roe, 39 Ohio St. 340.

As before stated, it must be admitted that in practice individual cases will arise in which the contribution of an employer may exceed the sums paid out of the fund to his own employees. In other words, cases may arise in which one employer will be found to have contributed to pay for the compensation to and care of the injured employees of other employers. The same condition existed and is specifically referred to in the opinion in the Noble case. It seems an answer to say that perfection or perfect equality is not expected or required of legislation (*Railroad Company v. Melton,* 218 U. S. 36); and if such ine-

qualities do arise the courts will presume that the legislature will make use of the statistics gathered in the operation of the act to readjust the schedules of contribution so as to more closely approximate exact equality. The act declares such intent (section 4) and provides for increasing the rate of contribution of careless employers.

Validity as to the Employe.

The act takes away absolutely from the employe his common law right of action against his employer for non-fatal injuries caused by the employers' negligence. As to fatal injuries, a cause of action against an employer was unknown to the common law, is of a statutory creation, and consequently (since the constitution of the state contains no inhibition) is without question subject to repeal by the legislature. The act carefully saves any right of action on account of any injury received prior to the date named for it to become operative upon the employers and the employes affected by it. The question involves, not the taking away of a vested right of action, but the changing of the law in respect to expectancies and possibilities of action, in which the party has no present interest.

At an early day the legislature of Pennsylvania passed a statute abolishing the doctrine of *respondeat superior* in the case of persons engaged on or near

railroads and not in the employ of the railroad company. The supreme court of Pennsylvania in *Kirby v. Railroad Co.*, 76 Pa. St. 506, said of the act (p. 509):

"The law says to him that the legal principle of *respondeat superior* shall have no place in this particular relation; that, as a matter of public policy for the good of all, those who voluntarily venture into employment alongside of the servants of a railroad company, shall have just the same remedies for injuries happening in the employment that these have, and none other. In doing this, no fundamental right of the person thus voluntarily venturing is cut off or struck down. The liability of the company for the acts or omissions of others, though they be servants, is only an offspring of law. The negligence which injures is not theirs in fact, but is so only by imputation of law. The law which thus imputes it to the company, for reasons of policy, can remove the imputation from the master and let it remain with the servant, whose negligence causes the injury."

This court, in *Martin v. Railroad Co.*, 203 U. S. 284, had before it the same statute, and sustained it, saying (p. 295):

"If it be conceded, as contended, that the plaintiff in error could have recovered but for the statute, it does not follow that the legislature of Pennsylvania in *preventing a recovery, took away a vested right or a right of property. As the accident from which the cause of action is asserted to have arisen occurred long after the passage of the statute, it is difficult to grasp the contention that the statute deprived the plaintiff in error of the rights just stated. Such a contention in reason must rest upon the proposition that the state of Pennsylvania was without power to legislate on the subject, a proposition which we have*

adversely disposed of. This must be, since it would clearly follow, if the argument relied upon were maintained, that the state would be without power on the subject. For it cannot be said that the state had authority in the premises if that authority did not even extend to prescribing a rule which would be applicable to conditions wholly arising in the future."

A right of action in favor of a third person against a master for negligence of his servant was a common law right of action.

Littleton v. Fowler, 1 Salk 282.
Blackstone's Com., 431.
Gray v. Portland Bank, 3 Mass. 363.
Harlow v. Humiston, 6 Cowen 189.

Judge Cooley, in his work on Constitutional Limitations, page 437 (6th Ed.), says:

"* * * In organized society every man holds all he possesses and looks forward to all he hopes for through the aid and under the protection of the laws; but, as changes of circumstances and of public opinion, as well as other reasons affecting the public policy, are all the while calling for changes in the laws, and as these changes must influence more or less the value and stability of private possessions, and strengthen or destroy well founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that many rights, privileges and exemptions that usually pertain to ownership under a particular state of law, and many reasonable expectations, cannot be regarded as vested rights in any legal sense."

This court in *Munn v. Illinois,* 94 U. S. 113, said (p. 134):

"But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to changes of time and circumstances."

This language was applied to the relation of master and servant in *Mining Co. v. Firstbrook*, 36 Colo. 498.

This court in *Western Union Telegraph Co. v. Milling Co.*, 218 U. S. 406, said (p. 416):

"We have seen that one division of the supreme court of the state was of the view that if the prohibition rested on the common law its validity could not be questioned. We cannot concede such effect to the common law and deny it to a statute. Both are rules of conduct proceeding from the supreme power of the state. That one is unwritten and the other written can make no difference in their validity or effect. The common law did not become a part of the laws of the states of its own vigor. It has been adopted by constitutional provision, by statute or decision, and, we may say in passing, is not the same in all particulars in all the states. But however adopted, it expresses the policy of the state for the time being only and is subject to change by the power that adopted it."

Some of the states have in their constitutions, in substance, the provision of Magna Charta: "Every man shall have a remedy for injury done him in

person, property or reputation." (No such provision is contained in the constitution of Washington.) Nevertheless, the principle last above stated has been sustained in states having such a constitutional provision. Instances are:

Templeton v. Linn County, 22 Ore. 313, 15 L. R. A. 730, in which the supreme court of Oregon said (p. 316):

"The words, 'and every man shall have a remedy by due process of law for injury done him in person, property, or reputation,' are claimed to operate as a guaranty in favor of all persons who might be injured by a county's neglect, that the legislature should never so change the statute as to destroy the liability of such county. In other words, the constitution found a certain liability created by statute resting upon the several counties, and tied the hands of the legislature, so that such liability should endure as long as the constitution shall remain in force. As a proposition of constitutional law, this contention seems startling, and although the constitutions of many of the states of this union contain substantially the same provision as section 10, *supra*, no judicial authority was cited upon the argument in support of it, and I think it may be safely assumed that none exists. * * * At the time of the repeal the plaintiff had no cause of action against Linn county, and her sole cause of complaint is that the repeal of the statute, before the injury, cut off a cause of action which she otherwise would have had against the county. * * * Vested rights are placed under constitutional protection, and cannot be destroyed by legislation. Not so with those expectancies and possibilities in which the party has no present interest."

Williams v. Galveston, 41 Tex. Civ. App. 63, 90 S. W. 505, in which the court said (p. 64):

"The citizen has no property right in a rule of law, tion of a legal rule which becomes vested and cannot be taken away from him by the change of the rule, and, while rights may accrue to him under the operahe cannot be heard to complain if, before such property rights become vested, the rule is so changed that no rights can accrue thereunder."

. . *Sawyer v. Railway Co.*, 49 Tex. Civ. App. 106, 108 S.W. 718, involving the constitutionality of a statute providing that no action should be brought for personal injuries unless a certain kind of affidavit was served within ninety days, the court saying (p. 112):

"Conceding that a cause of action for personal injuries is property, the cause of action, *i. e.*, the property, must exist before one can be deprived of it at all. A statute which abrogates a cause of action for personal injury before such cause of action has arisen, or before the injury occurs, or requires certain things to be done by the injured party as conditions precedent to a cause of action, does not deprive the injured party of his property without due process of law. * * * In other words, a legislature may create a right of action which never existed before, or abolish one that had before existed, if, in doing so, it does not affect rights which vested prior thereto. A party, injured after a legislature has taken away the right of action for personal injuries, can no more complain of it than a party against whom a right of action is given for an injury resulting in death can of such a legislative enactment. For the one party is no more injuriously affected by such legislation than the other. In the one case, what was before actionable ceases to be so; in the other, what was not before actionable becomes so."

A workman's cause or right of action for injury caused to him by the negligence of his employer is

property, and within the prohibition of the amendment. State legislation taking away from him such cause or right of action, after it had accrued to him, would, it may be assumed, be in violation of the amendment, though it has been held that a cause of action for tort may be destroyed by legislation after it has become vested, but has not ripened into judgment. *Eastman v. Clackamas,* 32 Fed. 24; *Bennett v. Hargus,* 1 Neb. 419. But, as has already been pointed out, it is the accrued cause of action which is property within the meaning of the amendment, not the rule of law creating a cause of action in instances to arise in the future.

To the cases cited may be added the decision of this court in *Railway Co. v. Sowers,* 213 U. S. 55, sustaining a New Mexico statute like that of Texas, in which the majority of the court announce the doctrine that it is within the legislative power conferred by congress upon the territories "to all rightful subjects of legislation" to legislate concerning the subject of personal injuries and to pass laws respecting rights of action of that character, and Justices Holmes and McKenna, although dissenting from the result, say that "the territory could have abolished the rights of action altogether if it had seen fit"; and the case of *Bennett v. Hargus,* 1. Neb. 419, holding, "It is sufficient to say that no respectable authority will be

found to the effect that a mere right to sue for a tort is, previous to the commencement of a suit, a vested right which the legislature cannot disturb."

In any event, this question is not before the court in this case. In *Jeffrey Mfg. Co. v. Blagg,* U. S. Adv. Sheets, No. 5, p. 164, decided January 5, 1915, it was contended that the Ohio Compensation Act was invalid as discriminating against employees in certain establishments. The court said (p. 169):

"No employee is complaining of this act in this case. The argument based upon such discrimination, so far as it affects employees by themselves considered, cannot be decisive; for it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of." (Citing many cases.)

TRIAL BY JURY.

In the specification of error it is charged that the act violates the seventh amendment to the Constitution of the United States, preserving the right of trial by jury. It is conceded, however, by counsel for plaintiff in error that the provision of that amendment does not apply to proceedings in state courts. This rule has been long established by the decisions of this court.

Edwards v. Elliott, 21 Wall. 532.
Walker v. Sauvinet, 92 U. S. 90.
Pearson v. Yewdall, 95 U. S. 294.
Spies v. Illinois, 123 U. S. 131.
Maxwell v. Dowe, 176 U. S. 594, 581.

The language of the seventh amendment is, "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

The contention of the plaintiff in error seems to be that if the act in question had not been passed a controversy between an injured workman and his employer might have become lodged in the Federal court, and since the act does not permit such an action to become lodged in any court, parties to such a supposed action are thereby deprived of their right to a jury trial of the controversy between them—in violation of the seventh amendment.

What has been said under the last preceding subdivision of the brief—in substance that the legislature of a state may lawfully abolish a cause of action to arise *in futuro*—would seem to dispose of this specification of error.

The plaintiff in error would have the seventh amendment interpreted as requiring that a provision of law (common or statutory) giving a right of action upon the happening of a certain future event is to continue unchanged forever as to facts yet to come into existence.

In this connection the attention of the Court is asked to the reasoning of the supreme court of Washington in the Clausen case (65 Wash. 207-211).

While it is true that the state court was speaking of the provision of the state constitution that "the right of trial by jury shall remain inviolate," yet the reasoning is quite as applicable to the seventh amendment. Among other things, the supreme court of Washington said:

"The constitution does not undertake to define what shall constitute a cause of action, nor to prohibit the legislature from so doing. The right of trial by jury accorded by the constitution, as applicable to civil cases, is incident only to causes of action recognized by law. The act here in question takes away the cause of action, on the one hand, and the ground of defense, on the other; and merges both in a statutory indemnity, fixed and certain. If the power to do away with a cause of action in any case exists at all, in the exercise of the police power of the state, then the right of trial by jury is thereafter no longer involved in such cases. The right of jury trial being incidental to the right of action, to destroy the one is to leave the other nothing upon which to operate."

It is to be remembered, however, that every question of fact which can arise under the act may be tried by a jury, that is to say: there is nothing in the act to prevent a jury trial. If the employer claims that he is not engaged in a business specified in the act, or that the workman is not in his employ, or that for any reason he ought not to make any payment which is demanded of him; or if the workman claims that he is not under the act—for instance, that he is not engaged in the kind of work described in the act—or was not injured in that relation to his work which

is covered by the act, or if he claims that the injury was brought upon him intentionally by his employer, or if it is claimed that he brought the injury upon himself intentionally; or if any one of the numerous questions of fact which might arise under the act do arise and are brought to the court; in every such case either party may have a jury trial of that issue of fact for anything contained in the act.

LIBERTY OF CONTRACT.

The guaranty of the fourteenth amendment of the liberty of contract is practically covered by the decisions of this court hereinbefore cited under the heading "Due Process of Law"; but there are a number of decisions of this court bearing more directly upon the force of the amendment in protecting the liberty of contract in its relation to the police power of the state, and we say confidently that it is thoroughly established that the liberty of contract is not protected by the amendment against the rightful exercise of the police power of the state. This principle has been variously expressed.

"The fourteenth amendment, however, does not guarantee the citizen the right to make within his state, either directly or indirectly a contract, the making whereof is constitutionally forbidden by the state."

Hooper v. People, 155 U. S. 648, 658.

"When it is said that the liberty of the citizen includes freedom to use his faculties 'in all lawful

ways,' and to earn his living by any 'lawful calling,' the inquiry remains whether the particular calling or the particular way brought in question in a given case is lawful; that is, consistent with such rules of action as have been rightfully prescribed by the State."

Booth v. Illinois, 184 U. S. 425, 428.

"But neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

Barbier v. Connolly, 113 U. S. 27, 31.

"It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts."

Frisbie v. U. S., 157 U. S. 160, 165.

"The right of contract, however, is subject to certain limitations which the state may lawfully impose in the exercise of its police power."

Holden v. Hardy, 169 U. S. 366, 391.

"It is subject, also, in the field of state action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals, and welfare of those subject to its jurisdiction."

C. B. & Q. R. Co., v. McGuire, 219 U. S. 549, 568.

"There must, indeed, be a certain freedom of contract, and, as there cannot be a precise verbal expression of the limitations of it, arguments against any particular limitation may have plausible strength, and yet many legal restrictions have been and must be put upon such freedom in adapting human laws to

human conduct and necessities. A too precise reasoning should not be exercised, and before this court may interfere there must be a clear case of abuse of power."

Mutual Loan Co. v. Martell, 222 U. S. 225, 235.

"But liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail—principle or condition—cannot be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint, or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of the judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance."

Erie R. Co. v. Williams, 34 Sup. Ct. Rep. 761.

See also:

Knoxville Iron Co. v. Harbison, 183 U. S. 13.
Muller v. Oregon, 208 U. S. 412.
McLean v. Arkansas, 211 U. S. 539.
Central Lumber Co. v. Dakota, 226 U. S. 157.
Grundling v. Chicago, 177 U. S. 183.
German Alliance Insurance Co. v. Lewis, 233 U. S. 389.

Respectfully submitted,

W. V. TANNER,

Attorney General of State of Washington,

Attorney for Defendant in Error.

Appendix "A"

FOREIGN LEGISLATION RELATING TO WORKMEN'S COMPENSATION AND INDUSTRIAL INSURANCE.

Industrial insurance and workmen's compensation acts have been adopted as follows:

Alberta, March 5, 1908.

Austria, December 28, 1887.

Belgium, December 24, 1903.

British Columbia, June 21, 1902.

Cape of Good Hope, June 6, 1905.

Denmark, January 7, 1898.

Finland, December 5, 1875.

France, April 9, 1898.

Germany, July 6, 1884. Supplemental Acts, May 28, 1885. Codification of all Acts, June 30, 1900.

Great Britain, August 6, 1897; July 30, 1900, and December 21, 1906, replacing former acts.

Greece, February 21, 1901.

Hungary, April 9, 1907.

Italy, March 17, 1898. This and subsequent acts codified January 31, 1904.

Luxemburg, April 5, 1902.

Netherlands, January 2, 1901.
New South Wales, November 5, 1900.
New Zealand, October 18, 1900.
Norway, July 23, 1894.
Quebec, May 29, 1909.
Queensland, December 20, 1905.
Russia, June 2, 1903.
South Australia, December 5, 1900.
Spain, January 30, 1900.
Sweden, July 5, 1901.
Transvaal, August 20, 1907.
Western Australia, February 19, 1902.

In all but six of the above countries the entire burden rests upon the employer. All the acts are formed with the view of obviating the necessity of legal proceedings, and if disputes arise arbitration tribunals are provided for. In most of the countries all rights under old liability laws are abrogated; in a few the injured employe retains the right to sue under the general liability laws in cases of gross negligence on the part of the employer, while in a very few cases the older liability laws are left undisturbed with the right to choose either method of compensation.

(For full synopsis of all foreign laws, see Bulletin of the Bureau of Labor, No. 90, pp. 720-748, Sept., 1910, issued by the Department of Commerce and

Labor of the United States, discussing the subjects: "Fatal Accidents in Coal Mining," "Recent Action Concerning Accident Compensation," "Foreign Workmen's Compensation Acts," and "Cost of Industrial Accident Insurance.")

Appendix "B"

COMPENSATION ACTS IN THE UNITED STATES.

Arizona. L. 1912, c. 14.

California. L. 1911, c. 399; largely superseded by L. 1913, c. 176.

Connecticut. L. 1913, c. 138.

Illinois. L. 1913 (c. 40, R. L.), House Bill 841.

Iowa. L. 1913, c. 147.

Kansas. L. 1911, c. 218; amended by L. 1913, c. 216.

Kentucky. L. 1914, c. 73.

Louisiana. L. 1914, Act No. 20.

Maryland. L. 1914, c. 800.

Massachusetts. L. 1911, c. 751; amended by L. 1912, cs. 172, 571, 666; L. 1913, cs. 445, 448, 568, 696, 746, 807, 813; L. 1914, cs. 338, 636, 708.

Michigan. L. 1912, Act No. 10; amended by L. 1913, Acts Nos. 50, 79, 156, 259.

Minnesota. L. 1913, c. 467.

Nebraska. L. 1913, c. 198.

Nevada. L. 1911, c. 183; amended by L. 1913, c. 111.

New Hampshire. L. 1911, c. 163.

New Jersey. L. 1911, c. 95; amended by L. 1912, c. 368; L. 1913, cs. 145, 174, 177, 301.

New York, L. 1914, c. 41; amended by L. 1914, c. 316, is c. 67, C. L.

Ohio. L. 1911, c. 251; amended by L. 1913, Senate Bills 48, 137, is c 28B Gen. Code of 1910.

Oregon. L. 1913, c. 112.

Rhode Island. L. 1912, c. 831; amended by L. 1913, cs. 936, 937.

Texas. L. 1913, c. 179.

Washington. L. 1911, c. 74; amended by L. 1913, c. 148.

West Virginia. L. 1913, c. 10.

Wisconsin. L. 1911, c. 50; amended by L. 1913, c. 599.

No. 18

OCTOBER TERM, 1915.

IN THE

Supreme Court of the United States

MOUNTAIN TIMBER COMPANY, Plaintiff in Error,

vs.

STATE OF WASHINGTON, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

REPLY BRIEF ON BEHALF OF MOUNTAIN TIMBER COMPANY

EDMUND C. STRODE,
COY BURNETT,
F. MARKOE RIVINUS,
THEODORE W. REATH,
Counsel for Mountain Timber Company Plaintiff in Error.

JANUARY, 1916.

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ALPHABETICAL LIST OF CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1915. No. 49.

Mountain Timber Company, Plaintiff in Error,

vs.

State of Washington, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

REPLY BRIEF ON BEHALF OF MOUNTAIN TIMBER COMPANY.

I

Considerations of policy cannot overcome constitutional restraints.

Our opponent (Brief for the State, pages 33–36) suggests six considerations in support of this law, viz: (*a*) Burden falls on those economically weakest: (*b*) Difficulty of recovery under existing law of *tort:* (*c*) Burden upon employers by excessive verdicts: (*d*) Economic waste of *tort*

liability insurance: (*e*) Antagonism between employers and employes created by the present system: (*f*) Burden inflicted upon society by economic waste.

And so the Legislature of the State of Washington has decreed that because some are weak, the strong shall bear their burden; because the determination of *tort* liability is difficult, the employe shall have his recovery in every case; because individualism is wasteful, communism or socialism shall take its place, and because there has been antagonism, employers and employes shall be no longer free.

The theory of Workmen's Compensation in systems such as the German is based on considerations of policy like those advanced by our opponents. An historical sketch will demonstrate that this theory is opposed to the American idea of individualism as expressed in the Fourteenth Amendment.

In the early part of the nineteenth century discussion arose among German philosophers as to what should be the relations of the State to its citizens. Such writers as Fichte and Hegel engaged in the discussion and developed socialistic doctrine to a high degree. In the fourth special report of Commissioner of Labor, Carroll D. Wright, on compulsory insurance in Germany, published in 1893, by the U. S. Government

Printing Office, the socialistic color is recognized as follows (page 19):—

> "The three laws of insurance against sickness, accident, and old age and invalidity confessedly rest upon a conception of society which is sharply opposed to what is loosely called individualism, or *laissez faire*. In the portentous mass of this insurance literature the thought is constantly expressed that the weaker members of a society will be excluded from all that accords with our usual sense of justice and fair dealing, until the centers of social influence, of which the first and most powerful is the State, become imbued with the idea that a large proportion of the misfortunes, sickness, accident, and premature age are social in origin rather than individual; that a vast part of these evils spring not from the fault of the individual, but from sources over which the individual has little or no control.

Following Fichte and Hegel come the socialistic writers Marx and Lassalle, who developed the paternal idea of government. The first insurance laws sprang into existence as a counter to socialistic activities of a type so subversive as to become a source of anxiety to the German Government. Bismarck acknowledged himself a Socialist in the sense of conceding the laborer's right to work and the State's duty to act widely, generously, and positively for his welfare. The doctrine was accepted by the German Government

as a matter of expediency to counteract discontent of the German working classes.

As there was no constitutional restraint in Germany, the question of public policy raised by such doctrines was and still is open to debate. The following striking statement of the broad bearings of the question is contained in the introduction (p. 5) to the pamphlet on "Undesirable Results of German Social Legislation," by Ludwig Bernhard, Professor of Political Economy at the University of Berlin, published by Workmen's Compensation Publicity Bureau, New York, 1914:

> "In the literature of all countries, this question always returns: How far may the freedom of movement of the individual, his spirit of enterprise, his independence and sense of personal responsibility, how far may and should these sacred powers be restricted out of a proper regard for the interests of the whole body of the people?
>
> The philosopher, the politician, the clergyman and the technical man, all these are thinking of and discussing this question. But no one has determined with absolute certainty the point at which legislation in the interests of society as a whole should stop. Nor will anyone ever be in a position to do this, inasmuch as every period has its own peculiar requirements. For history reveals to us a changing struggle between the individual and society in an organized form; the individual contend-

ing first with the city commonwealth, then with the guild, again with the four estates and lastly with the socialistic community.

We realize that this contest between individualistic and socialistic ideals has been an impelling force in the history of the world, perhaps the greatest impelling force. We recognize the highly beneficial effect of the guilds during the period in which they arose and throve, of this iron-clad form of organization, to which the former glory of German cities was due. But we also know that later, when it was necessary to bring about a new arrangement, men of strong personality burst the fetters of the guild system, and that those countries made the fastest progress in which the individual struck out most freely and boldly into untrodden paths.

Thus does history inform us of changes which at all stages were both welcomed and execrated. Every time such a change took place a flood of literature arose dealing with the old question: Where is the line to be drawn between the rights of the individual and the rights of society considered as a whole? And each time the writers finally had to admit that they knew of no answer."

Turning to the Washington law we find a frank taking of the employers' property is sought to be justified by the declaration (Section 1 of the law, brief of plaintiff-in-error, page 29) that the common law system of *tort* liability is

"economically unwise and unfair"; that "little of the cost of the employer has reached the workman and that little only at large expense to the public * * *. The State of Washington, therefore, exercising herein its police and sovereign power" withdraws the entire subject from private controversy by imposing an insurance liability upon the employer.

An examination of the theory of the Washington law and of its German prototype suggests a distinction of principle between such a law and those statutes which are intended to create rights in or to conserve the rights of members of society as individuals. By the terms of a compensation law no alteration is intended to be made in the privity of the contractual relationship in the sense of regulating the physical performance of its duties by prescribing obligations of conduct and rules of liability for the non-observance thereof. The object of such a law is rather to use the privity of relationship created by the labor contract as a basis of raising between the parties a new and independent contract of insurance, evidenced by an insurance policy declared by and expressed in a statute.

On the other hand, the law of *tort* including employers' liability statutes pertains to the redress of private wrongs. The damages recoverable

where liability is sustained are intended to be commensurate with and to reimburse the employe for the injury suffered. But the obligations of workmen's compensation accrue from contingencies not within the control of the parties and thus have no relation to the conduct of the parties; and the compensation is not intended to be commensurate with the injury but is based upon some percentage of the employe's wages.

Accordingly we see that the objects of compensation laws would be sufficient on which the German Empire might legislate; but they are beside the question of constitutional restraint.

The considerations advanced by our opponent are expressions of good intentions against which Webster warned (Vol. II, Writings and Speeches of Daniel Webster, pages 207-8,—National Edition, Little, Brown & Co., 1903):

> "Good intentions will always be pleaded for every assumption of power, but they cannot justify it, even if we were sure that they existed. It is hardly too strong to say, that the Constitution was made to guard the people against the dangers of good intention, real or pretended. When bad intentions are boldly avowed, the people will promptly take care of themselves. On the other hand, they will always be asked why they should resist or question that exercise of power which is so fair in its object, so plausible and patriotic in appearance, and which has the public good alone confessedly in view?"

The experience of foreign countries where this system has been tried is important. "Accident" being found difficult to define, "occupational diseases" were included. "Occupational diseases" being difficult to limit or distinguish, their "*sequelae*" and ultimately sickness generally of the workman, were covered. Then, when the tendency of the employer to reject from his pay-roll the "under-average risk" naturally developed, the State was driven to include in the scheme unemployment insurance and finally old age pensions. Without leaving a litigious or distressing borderland, each of these successive fields must be occupied by the State, until no duty of thrift or foresight is left to the workman or the employer. And finally the moving considerations of policy must drive the system, beyond the relation of master and servant, to include all misfortune.

The Fourteenth Amendment was adopted to preclude such philanthropic interference with the liberty of a self-reliant race. If the centralized advantages of communism or socialism are deemed preferable, the Constitution provides a method of amendment resulting in certainty of right. The idea so often suggested in this connection that somehow constitutional restraints stand as a barrier to modern progress is based on a one-sided view of the problem. The choice is not a choice of the supposed advantages of socialism and the

defects of individualism but of the advantages and defects considered together of these two great conceptions.

But that choice may not be made or sanctioned by this Court for the nation. The question here is, has the Constitution limited the State legislatures so as to preclude this legislation and the socialistic conception of Governmental function upon which it is based?

We shall not be able to determine whether the Fourteenth Amendment invalidates the Washington Compulsory Compensation Act by any mere considerations of economic policy. Express organic restraints are not so overcome. We turn to a consideration of the legal arguments advanced in support of such legislation.

II

Under the pretext of the police power a State may not abrogate the guarantees of the Fourteenth Amendment.

In the present instance the Legislature of Washington lays the ground for this so-called exercise of the police power by a finding that substantially all of the industrial operations in the State are "extra hazardous." (Sec. 2; Brief for Timber Co., page 30.) By no intelligible definition or understanding of the words "extra hazardous" can this legislative finding be true. All occupations are in

some degree hazardous. Life is hazardous. Demonstrably many of the industries named in the Washington law are not extrahazardous as compared with agricultural or domestic occupations. Statistically, agriculture, for example, proves one of the most hazardous of all occupations, more hazardous than railroading. Mr. F. C. Schwedtman, President of the Citizens Industrial Association of St. Louis, Missouri, testifying before the Federal Workmen's Compensation Commission at Chicago, on October 16th, 1911 (see report of and hearings before that Commission, Senate Document No. 338, 62nd Congress, Second Session, Volume 2, page 672) said:

> "German statistics prove that farming is more hazardous than the average of all the industries, and American facts and figures indicate that the risk of farming is equal to that of carpenters and greater than the risk of machinists."

Yet farming is omitted from the Act.

The Legislature cannot say that which is either obviously impossible or demonstrably untrue, and having said it be above judicial review and constitutional restraint.

In Lochner *vs.* New York, 198 U. S. 45, Mr. Justice Peckham said:

> "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute con-

cerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?"

Mr. Justice Brewer said in Muller *vs.* State of Oregon, 208 U. S. 420:

> "It is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking."

But there can be no permanence and stability in the fundamental concepts of government if

the Courts may abandon the attempt to define the limits of police power as impossible and then justify, upon legislative fiat, a law against constitutional objection as an exercise of that power. In Lochner *vs.* New York, *supra,* this Court realized and faced its difficult duty in this regard. There a law limiting the hours of employment in bakeries was held arbitrary. Mr. Justice Peckham said at page 58:

> "We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris,* as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go."

As showing that ordinary occupations though hazardous in some degree cannot be arbitrarily regulated Mr. Justice Peckham further said at page 59:—

> "We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which

would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. In looking though statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government. It might be safely affirmed that almost all occupations more or less affect the health."

This was a difficult case owing to a conflict of evidence as to hazard. But the principle of the case that legislative fiat cannot make hazard if none exists is changeless and established by all authority in this Court.

The Washington Compensation law in substantially all the callings of industrial life by such a legislative fiat of hazard attempts to deprive the employer and employe of liberty of contract by requiring the employer to insure his employe

against industrial accident and the employe to surrender his other rights. The Washington law includes bakeries under "working in food stuffs," also "creameries"—in short, substantially all the industrial occupations. (Brief of Mountain Timber Co., page 35.)

Compensation laws are based on a socialistic, economic theory. That theory has no relation to hazard. The farm-hand or domestic servant who breaks his arm at work is from the economic viewpoint as much entitled to compensation and State support as the industrial worker. And such was the German and English experience where the compensation scheme was of necessity finally extended to all employments irrespective of hazard. The essay on hazard which constitutes the introduction of the Washington law is for the purpose of meeting constitutional objection to a socialistic scheme; but hazard as a ground of the law is embarrassing in the execution of the economic policy. For we find hazard put forward in justification of the law, but stretched beyond judicial recognition. Hazard is put forward to meet constitutional objection; while the conflicting economic theory, which must disregard hazard, is put forward to justify the law under the police power.

III

The Washington Compensation Act is not referable to the Taxing Power.

The Washington Compensation law cannot be justified as special taxation upon employers to compensate employes for injuries incurred in employment. In this aspect the taxing power of the State is invoked to execute an economic theory rather than to raise revenue. As Cooley on Taxation at page 1125 says:—

> "There are some cases in which levies are made and collected under the general designation of taxes, or under some term employed in revenue laws to indicate a particular class of taxes, where the imposition of the burden may fairly be referred to some other authority than to that branch of the sovereign power of the State under which the public revenues are apportioned and collected. The reason is, that the imposition has not for its object the raising of revenue, but looks rather to the regulation of relative rights, privileges, and duties as between individuals, to the conservation of order in the political society, to the encouragement of industry, and the discouragement of pernicious employments. Legislation for these purposes it would seem proper to look upon as being made in the exercise of that authority which is inherent in every sovereignty, to make all such rules and regulations as are needful to secure and preserve the public order, and to protect each individual in the enjoyment

> of his own rights and privileges by requiring the observance of rules of order, fairness, and good neighborhood, by all around him. This manifestation of the sovereign authority is usually spoken of as the police power."

And so the problem is not changed, for the compensation law must still be a legitimate exercise of the police power. The problem of restraints, then, is not simplified by reference to the taxing power; it is further complicated by consideration of a superadded set of restraints,—those appropriate to the taxing power.

Taxation must always be according to constitutional restraints. Economic theory cannot *alone* justify its exercise. Economic advantage may inhere in or result from a particular tax scheme but this is incidental, and not the constitutional justification of the scheme. If economic advantage would justify the taking of property for some purpose benign in itself, we should see the end of constitutional restraints upon the taxing power. The power to levy taxes must be exercised in furtherance of some public purpose. In Savings & Loan Association *vs.* Topeka, 20 Wall. 655, Mr. Justice Miller said:—

> "Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used and the extent of

its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the national defense, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government.

The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of McCulloch *vs.* Md., 4 Wheat. 431, that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent. imposed by the United States on the circulation of all other banks than the National Banks, drove out of existence every state bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation."

The purpose of the Washington law is not public. The object of the law is to impose the ordinary risks of the employes' industrial life upon the employer alone. The considerations of policy advanced in support of this legislation could not confine its scope to the risks of industrial life. Every casualty which might cause distress, such as sickness, unemployment or old age, would equally justify and (as history has shown) require a State grant of the employer's money.

The Washington law has no such public purpose as appeared in Chicago *vs.* Sturges, 222 U. S. 313, where Mr. Justice Lurton, sustaining the Illinois Act imposing liability on a municipality for mob damage, said (pages 323-4):—

> "Such a regulation has a tendency to deter the lawless, since the sufferer must be compensated by a tax burden which will fall upon all property, including that of the evil doers as members of the community."

Moreover, the burden of the Washington Act does not fall upon all property. The burden falls exclusively upon employers. To constitute selected persons a class for taxation some legal reason must exist for the selection of the class. The cases of special assessments are sometimes

referred to as justifying the selection of employers out of the public to bear the burdens of workmen's compensation in the form of taxation. But there is no analogy because to justify selection for special taxation there must be some peculiar benefits. Familiar instances of this form of special assessment for special benefits will occur, such as assessments upon adjoining owners of real property for paving or drainage. In condemning such local assessments for *repaving,* Sharswood, J., said in Hammett *vs.* Philadelphia, 65 Pa. 146 (page 157):—

> "Local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on the properties assessed, and to the extent of those benefits. They cannot be so imposed when the improvement is either expressed, or appears to be for general public benefit."

Substitution of liability in all cases for liability in *tort* for negligence is not such a benefit.

But the relevancy of these and other analogies need not be determined if the purpose of the law is not public in the taxing sense. The purpose of the Washington law is to compensate industrial injury to all employes. The act is economic and is not restrained to the poor and the indigent and hence is not for the maintenance of public charity. The employe who has adequate accident insur-

ance or means of his own has equal rights with the employe who, pending his recovery from a similar injury, might be a charge on the public.

In Weismer *vs.* Village of Douglas, 64 N. Y. 91, the underlying principle of the limitation of taxing power is set forth as follows:—

> "To use the not uncommon illustrations, it must be far beyond the reach of real legislative authority to take the property of A, or of A and some, many or all others, and give it to B, when there is no legal, equitable, just or moral obligation to render unto B one farthing. But to tax A and the others to raise money to pay over to B is only a way of taking their property for that purpose."

In Ohio & Mississippi Ry. Co. *vs.* Lackey, 78 Ill. 55, an act making railroad companies liable for all expenses of the coroner and his inquest, and the burial of all persons who may die on its cars, was held unconstitutional. Breese, J., said:—

> "An examination of the section will show that no default, or negligence of any kind, need be established against the railroad company, but they are mulcted in heavy charges if, notwithstanding all their care and caution, a death should occur on one of their cars, no matter how caused, even if by the party's own hand. Running of trains by these corporations is lawful, and of great public benefit. It is not claimed that the liability attaches for the violation of any law, the

> omission of any duty, or the want of proper care and skill in running their trains. The penalty is not aimed at anything of this kind. We say penalty, for it is in the nature of a penalty, and there is a constitutional inhibition against imposing penalties where no law has been violated or duty neglected. Neither is pretended in this case, nor are they in the contemplation of the statute. A passenger on the train dies from sickness. He is a man of wealth. Why should his burial expenses be charged to the railroad company? There is neither reason nor justice in it; and if he be poor, having not the means for a decent burial, the general law makes ample provision for such cases. As argued by the counsel for appellant, the law attempts to place what is properly a public burden upon these corporations, which should be borne by all alike, and discharged out of public funds raised by equal and uniform taxation."

In Ives *vs.* South Buffalo Railway, 201 N. Y. 271, the case in which the first New York Compulsory Act was declared unconstitutional by reason of the due process clause of the New York Constitution, Chief Judge Cullen said, page 320:—

> "Individual citizens following the ordinary vocations of life * * * cannot be compelled to contribute to the indemnity of other citizens who, by misfortune or the fault of themselves or others, have suffered injuries, except by the exercise of the power of taxation imposed on all, at least all of the same class, for the maintenance of public charity."

IV

A compulsory Workmen's Compensation Act takes the employers' property without legal reason, invades his and his employe's right of private contract in a matter with which the public has no concern by introducing a term of industrial insurance, and is not due process or equal protection required by the Fourteenth Amendment.

Mr. Justice Johnson explained the words "due process of law"

> "That they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice;"
>
> Bank *vs.* Okely, 4 Wheaton, 244.

Webster in his argument in the Dartmouth College case (Trustees of Dartmouth College *vs.* Woodward, 4 Wheat. 518, at page 581), thus defined law of the land:

> "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."

And in Washington *ex rel.* Oregon R. & N. Co. *vs.* Fairchild, 224 U. S. 510, Mr. Justice Lamar said at pages 524-5:—

> "* * * the hearing which must precede the taking of property is not a mere form. The carrier must have the right to secure and

present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen, but to give legal effect to what has been established."

* * * * * * *

Our opponent refers to a number of authorities in an effort to justify the present instance of a taking of property without regard to fault. For clearness we have classified these authorities under six heads *infra*, and we shall now proceed to examine them.

1. Dangerous Instrumentalities:

In St. Louis & San Francisco Ry. Co. *vs.* Mathews, 165 U. S. 1, this Court sustained the statute of Missouri by which every railroad was made responsible in damages for property injured or destroyed by fire communicated by its locomotive engines. Mr. Justice Gray thus stated the underlying principle of the decision:—

"When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring the private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company which employs the instruments and creates the peril for its own profit rather than upon the owner of the property, who has no control over or interest in those instruments."

The absence of fault of the property owner justifies the imposition of the loss upon the user of a dangerous agency, even though he be faultless; but this does not justify an imposition of loss without regard to the presence or absence of fault on either side.

The same considerations deprive of analogy such cases as Heeg *vs.* Licht, 80 N. Y. 579 (the explosion of a powder plant), and Rylands *vs.* Fletcher, L. R. 3 H. L. 330 (the bursting of a dam) (a case not generally followed in this country, by the way—Actiesselskabet Ingrid *vs.* Central of New Jersey 216 Fed. 72, C. C. A. 1914), and all the other dangerous instrumentality cases.

2. Classification:—

Another case to which our opponent refers is Jeffrey Mfg. Co. *vs.* Blagg, 235 U. S. 571, holding that an employer could not object to the discrimination which the Ohio Workmen's Compensation Act made as between employes in shops with five or more and those in shops having a less number; and that employers affected by that law in having their defenses of contributory negligence, assumed risk and fellow-service taken away, were not deprived of the equal protection of the law as compared with employers employing less than five men. This case has no application to the case at bar. The Ohio Act was a *voluntary* act. This Court

observed: "No employer is obliged to go into this plan. He may stay out of it altogether if he will" and hence that case presented no question of due process material here.

3. Forbidding contracts which are against public policy:—

Our opponent refers to C. B. & Q. R. Co. *vs.* McGuire, 219 U. S. 549, holding a relief department contract of a Railway invalid under a state statute which forbade the making of contracts of release before injury. The principal ground of attack was that the statute violated the Fourteenth Amendment in restraining liberty of contract. But this court pointed out that the Legislature could prohibit contracts which "would alter or impair the obligation imposed" by the law of negligence.

The police power of the states is adequate to protect employes from making, in advance of injury, improvident contracts to release their rights. But can it be argued that the power to *forbid* a contract as against public policy includes the power *to make* a contract which the parties have not made?

4. Regulating businesses affected with a public interest:—

Nor is the case Chicago, Rock Island & Pacific Ry. Co. *vs.* Zernecke, 183 U. S. 582, analogous.

There a statute of Nebraska imposing upon railroad companies absolute liability for injuries to passengers was held a valid exercise of the reserved power of the state to alter or amend the corporate charter of the railroad. The court also discussed and approved the doctrine that a carrier may be made an insurer of the safe performance of its contracts of carriage, by reason of the public nature of and interest in their business. The courts can not extend such a rule of insurance to private relations. To use the language of Chief Justice Marshall in Boyce *vs.* Anderson, 2 Pet. 150.

> "The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in the cases to which it has been applied, we admit its necessity and its policy, we do not think it ought to be carried further, or applied to new cases."

The language of Mr. Justice Holmes in Noble State Bank *vs.* Haskell, 219 U. S. 104, remains to be noticed. Speaking of police power he said:

> "It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

This was meant in the sense in which the same idea was expressed in Muller *vs.* State of Oregon,

208 U. S. 412, where Mr. Justice Brewer said at page 421:—

> "Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."

The "prevailing morality" referred to by Mr. Justice Holmes does not mean, in the connection in which he uses the expression, the transient opinion of a majority. As Chief Judge Cullen pointed out in his concurring opinion in the Ives case (201 N. Y. at page 319) such a construction of the word "prevailing" "would justify" "any legislation, if only supported by a sufficient popular demand;" but as he also added, it would be "both unfair and unsafe to excerpt fragmentary sentences from the opinion of a court and interpret them apart from the context of the whole opinion."

Mr. Justice Holmes used the word "prevailing" in the sense of predominant for all time and he was alluding, in general terms, to moral precepts which are axiomatic.

Moreover, the above quotation occurs in the case which determined the constitutionality of an Oklahoma Act imposing an assessment upon state banks for the creation of a depositors' guaranty fund. The Act was upheld as an exercise of the police power, like any other regulation to which the public business of banking may be subjected. Mr. Justice Holmes said:—

> "The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied. The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank."

So impressed was he with the public nature of the banking business that he also said:—

> "We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the state in taking the whole business of banking under its control."

Upon rehearing, (219 U. S., 575),

> "The payment can be avoided by going out of the banking business, and is required only

as a condition for keeping on, from corporations created by the State."

5. *Cases misconceived or erroneously applied.*

The decision of the Court of Appeals of New York on July 13, 1915, in Jensen *vs.* Southern Pacific R. Co., 215 N. Y. 514, 109 N. E. 600, upholding the present compulsory New York Workmen's Compensation Act against attack under the Fourteenth Amendment was an erroneous interpretation of the decision of this court in Noble State Bank *vs.* Haskell, *supra*.

The error into which the New York court has fallen is in applying the decision of this court upholding the Oklahoma banking law in regard to a business affected with the public interest, to private business, private employment and private contracts which may not be so regulated. The point to be remembered is that a public business may be regulated and the regulation will be due process in a way which would not be due process as to a private business.

Our opponent cites Atlantic Coast Line Railroad Company *vs.* Riverside Mills, 219 U. S. 186, as "another instance of statutory imposition of absolute liability" and refers to the Carmack Amendment as making the initial carrier liable to the shipper "for loss or damage to his goods" on the line of another carrier. This Court upheld

the Carmack Amendment in the Riverside Mills case *as a carrier rule of evidence* by which Congress has said to the carriers:—

> "If you receive articles for transportation from a point in one state to a place in another, beyond your own terminal, you must do so under a contract to transport to the place designated:"
>
> Opinion of Mr. Justice Lurton, page 206.

Also St. Louis Iron Mountain & Southern Railway *vs.* Taylor, 210 U. S., 281, is cited, holding that Congress could create by law an absolute duty to have drawbars in cars of standard height and could be made liable for a failure to perform this duty. The substantive law as to duty and care by the master may be altered reasonably by legislative authority. The power to alter substantive law by creating new duties, and new *torts* for their breach, is thus relied upon as a basis for compensation irrespective of neglect of duty.

Also Louisville and Nashville R. R. Co. *vs.* Melton, 218 U. S. 36, is cited that legislation of the States in classifying is not held to perfection or perfect equality. In that case this Court held that a State might enact an employers' liability law applying solely to railroads. This Court declined to strike down the Act because in some details of the business of railroading the activities of the employes were not as hazardous as in train serv-

ice. The case is no authority for the arbitrary classification of substantially all industrial businesses under one head as extra-hazardous.

6. *The Admiralty Cases:*

Our opponent relies upon The Osceola, 189 U. S. 158. There a vessel was held not liable to one of the crew injured through the negligent order of the Master in directing a gang-way to be hoisted before the arrival of the vessel at dock; and the Court also held that such injuries were not done by the ship so as to impose liability by reason of a Wisconsin Statute. In the opinion Mr. Justice Brown examined the sources of the Admiralty law and declared, that the vessel and her owners would be "liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued," and irrespective of "whether the injuries were received by negligence or accident." This implied term of the seaman's contract for maintenance and cure during the voyage arose from the necessities of sea-faring and is confined to the admiralty. In the very nature of the case the ship was the only place where, during the continuance of the voyage, the sailor who became ill or was injured could be taken care of.

The decision in Stoll *vs.* P. C. S. S. Co., 205 Fed. 169, is also relied upon by our opponent. In that case the Court held that Congress had not legislated as to a stevedore and that the Washington Compensation Act applied to his injury in loading a vessel. The Court followed the Supreme Court of the State of Washington in holding the Act constitutional and did not state its reasons or, so far as the opinion shows, consider the constitutional question independently.

* * * * * *

The current of judicial decision in the United States appears to incline toward the unconstitutionality of Workmen's Compensation legislation in compulsory form. Evidently for this reason have so many states adopted the voluntary form. As of interest the following cases upholding voluntary compensation laws on the theory of contract are cited:—

In re Opinion of Justices (Supreme Judicial Court Mass., July 24, 1911), 96 N. E. 308;

Borgnis *et al vs.* Falk Company (Supreme Court Wisconsin, November 14, 1911), 133 N. W. 209;

Sexton *vs.* Newark District Telegraph Company (Supreme Court New Jersey, February 25, 1913), 86 Atl. 451;

Clem *vs.* Chalmers Motor Company (Supreme Court Michigan, January 5, 1914), 144 N. W. 848;

Deibeikis *vs.* Link-Belt Company (Supreme Court Illinois, February 21, 1914), 104 N. E. 211;

Hawkins *vs.* Bleakley, (U. S. Dist. Court So. Dist. Iowa, Cent. Div., June 22, 1914), 220 Fed. 378;

Matheson *vs.* Minneapolis Street Railway Company, (Supreme Court Minn., July 3, 1914), 148 N. W. 71;

Gorrell *vs.* Battelle, (Supreme Court Kansas, November 14, 1914), 144 Pac. 244;

Bayon *vs.* Beckley, (Supreme Court of Errors Connecticut, February 23, 1915), 93 Atl. 139;

Behringer *vs.* Inspiration Consolidated Copper Company, (Supreme Court Arizona, July 7, 1915), 149 Pac. 1065;

Coakley *vs.* Mason Mfg. Co., (Supreme Court Rhode Island, July 7, 1914), 90 Atl. 1073.

De Constantin *vs.* Public Service Commission, (Supreme Court Appeals West Virginia, September 20, 1914), 83 S. E. 88.

In New York a constitutional amendment was deemed necessary to overcome the due process clause of the New York Constitution. Probably for the same reason, express constitutional authority for such legislation was thought necessary in the State of Ohio in order to substitute for the previous elective compensation law a law in compulsory form: See Porter *vs.* Hopkins, (Supreme Court Ohio, November 11, 1914), 109 N. E. 629.

So, too, in California it was thought necessary to amend the State Constitution in order to pass such a law in compulsory form: See Western In-

demnity Company *vs.* Pillsbury *et al,* (Supreme Court California, August 4, 1915), 151 Pac. 398.

On the other hand without an enabling constitutional provision the original compulsory compensation law of the State of New York was declared repugnant to the due process clause of the New York Constitution: Ives *vs.* South Buffalo Ry. Co., 201 N. Y. 271. And in Texas, in spite of the color of a voluntary form, a compensation law has been declared repugnant to the due process clause of the Federal and the Texas Constitutions: Middleton *vs.* Texas Power & Light Co. (Court of Civil Appeals, Austin, January 20, 1915), 178 S. W. 956. In Kentucky a compensation law in voluntary form was declared unconstitutional as really compulsory: State Journal Co. *vs.* Workmen's Compensation Board, 170 S. W. 1166, Ky., 1914.

* * * * * * *

We turn to the cases which state the principles which apply.

The law of property affords security to one in the possession of his property who is without fault, actual or constructive.

In Harvey *vs.* Dunlap, Lalor's Supplement to Hill and Denio (N. Y.) 193, Nelson, J., said:—

> "No case or principle can be found, or, if found, can be maintained, subjecting an individual to liability for an act done without fault on his part."

This principle was recognized and applied in the Nitro-Glycerine Case, 15 Wall. 524, where Mr. Justice Field said:—

> "The mere fact that injury has been caused is not sufficient to hold them" (the defendants). "No one is responsible for injuries resulting from unavoidable accident, whilst engaged in a lawful business."

The law, it will be observed, was not a regulation of the business of carriage.

In Jensen *vs.* Union Pacific Ry. Co., 6 Utah, 253, s. c. 4 L. R. A. 724, a statute provided that every railroad corporation which shall injure or kill live stock by running any engine over or against it shall be liable to its owner for injuring or killing it. Judd, J., said:—

> "It will then be seen that the defendant is in the exercise of a lawful right, in a lawful way. Now comes the statute and says to the defendant: 'Notwithstanding all this, when you kill an animal you shall pay its value to the owner.' That is, although you are in the exercise of a perfectly lawful pursuit, and without any fault or negligence, proof of killing and value shall be conclusive evidence of wrong upon your part, and you shall not be allowed to aver or prove the contrary. If this be due process of law, then all the legislature has to do, to take the property of A and give it to B, is to enact that when A sues B certain admitted facts shall establish conclusively A's right to recover, and B shall not be heard to introduce evidence to the contrary."

To the same effect are the decisions in—

Zeigler *vs.* South & North Alabama Ry. Co., 58 Ala., 594;

Birmingham Ry. Co. *vs.* Parsons, 100 Ala., 662;

Bielenberg *vs.* Montana Union Ry. Co., 8 Mont., 271 s. c. 2 L.R.A. 813;

Schenck *vs.* Union Pacific Ry. Co., 5 Wyoming 430;

Cottrell *vs.* Union Pacific Ry. Co., 2 Idaho 539, s. c. 21 Pac. Rep. page 416.

In Camp *vs.* Rogers, 44 Conn. 297, the Court, in considering the statute making the owner of a vehicle liable for any damage occasioned by the driver's negligence, even though the driver were not the agent of the owner, said:—

> "It (such a statute) is so far void, either as manifestly against natural justice, or as violating that article of the Constitution which forbids the taking away of any person's property 'without due process of law.' If such a law so construed were to be held valid, then a law that should, by a merely arbitrary rule make one man liable for the debts of another would be valid."

And see Black on Constitutional Law; 351 (2d ed.).

> "Such statutes cannot go beyond the imposition of such a penalty in cases where the

> fault lies at the door of the company. If the law attempts to make such companies liable for accidents which were not caused by their negligence, or disobedience to the law, but by the negligence of others, or by uncontrollable causes, or does not give the company an opportunity to show these facts in its own defense, it is void."

Any legislation which interferes with the equality of right of employer and employe "is an arbitrary interference with the liberty of contract which no government can legally justify in a free land": Mr. Justice Harlan in Adair *vs.* United States, 208 U. S. 161 at page 175. And this is true even though the attempt is clothed in good intentions for public welfare.

The Washington law is not due process, denies equal protection, and is in violation of the Fourteenth Amendment.

EDMUND C. STRODE,
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F. MARKOE RIVINUS,
THEODORE W. REATH,
Counsel for Mountain Timber Company.

JANUARY, 1916.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1914.

Number 332.

MOUNTAIN TIMBER COMPANY, PLAINTIFF IN ERROR,

VS.

STATE OF WASHINGTON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF WASHINGTON.

BRIEF OF PLAINTIFF IN ERROR.

EDMUND C. STRODE, Lincoln, Nebr.; COY BURNETT, Portland, Ore., *Attorneys for Plaintiff in Error.*

I.

STATEMENT OF THE CASE.

This case presents the question of the constitutionality of the so-called Workman's Compensation Act of the state of Washington, being chapter 74 of the Session Laws of Washington, of 1911, a copy of which act is attached hereto and marked Appendix "A." This action was commenced by the filing of a complaint against plaintiff in error to recover premiums and contributions levied in pursuance of the said

Compensation Act upon defendant. Defendant interposed a demurrer questioning the constitutionality of said Workman's Compensation Act, because of the said Compensation Act being contrary to, and infringing a number of sections of the constitution of the state of Washington, and the following sections of the constitution of the United States:

1. Section 4 of article 4, Constitution of the United States.

2. Seventh amendment to the Constitution of the United States.

3. Section 1 of the Fourteenth amendment to the Constitution of the United States.

This demurrer was overruled and judgment rendered against plaintiff in error, whereupon plaintiff in error appealed from said judgment to the supreme court of Washington, and there presented the same questions urged in said demurrer, the decision of the supreme court of the state of Washington, being the highest appellate court of that state, decided the case against this plaintiff in error, and decided that said Workman's Compensation Act was not contrary to and did not infringe section four of article four of the Constitution of the United States, or the Seventh amendment to the Constitution of the United States, or section one of the Fourteenth amendment to the Constitution of the United States, as well as holding that it did not violate or infringe any of the provisions of the constitution of the state of Washington, set up in said demurrer.

II.

SPECIFICATION OF ERRORS.

Plaintiff in error claims:

A. That the supreme court of the state of Washington erred in not holding that said Workman's Compensation Act is unconstitutional and void in that it is contrary to and infringes section 4 of article 4 of the Constitution of the United States.

B. That the supreme court of the state of Washington erred in not holding the said Compensation Act unconstitutional and void in that it is contrary to and infringes the Seventh amendment to the Constitution of the United States.

C. That the supreme court of the state of Washington erred in not holding said Compensation Act unconstitutional and void in that it is contrary to and infringes section 1 of the Fourteenth amendment to the Constitution of the United States.

III.

ARGUMENT.

The action being one to recover premiums made due under the said Workman's Compensation Act and the question of its unconstitutionality necessarily going to the entire act because the plan runs throughout the entire act, we will discuss the provisions of the act according to the separate sections thereof, and our first discussion of the act will be upon a broad basis, whereas, later in this brief we make a specific citation of authorities applicable.

1. The act in section 1 declares that questions of fault shall not be involved in an adjudication of liability. Upon this we would say that the question of fault has been the controlling factor in a determination of liability from time immemorial. The general rule is that obligations are either assumed by contract expressed or implied, or arise from some wrongful act. The exception to this rule is however, that the state may imply a liability in matters in which the public generally, as distingnished from employer and employee, is vitally interested, or in which the business so regulated receives special benefit from the public generally. Any of the businesses covered by this act are not illegal; and the engaging therein does not authorize a state to remove competition from the business in any of its departments, or to enact rules which would take part of the property so invested and give it to others without any claim that the person engaging in such business had done any act which by any standard known among men could be

said to be illegal, or otherwise than provident and careful. We believe that this act if allowed to stand would eventually authorize whichever side of the question had the most votes to arbitrarily vote the property of the minority to those holding the majority.

2. In section 1 of the act it is declared that the court shall be closed to hear questions of liability as between employee and employer or persons engaged in certain enumerated occupations. We had always understood that the right to be heard in court as to our liability was one of which we could not be deprived; that if we were wrong either because we had not complied with the degree of care which the statutory enactments required, or because we had failed to fulfill the duties owed by one person to another without regard to statutory law, that we had a right to have a court tell us where and how we had erred.

3. Section 2 of the act purports to make a specific enumeration of the employments which the legislature is pleased to call extra hazardous, but in fact which include about all the work that can be done by a body of men. No legislature has a right, except upon most mature specific study, to declare that a particular business is so dangerous to the public generally as to require an indemnity payment either to the state or other persons engaged in such business. This act so completely covers all employments that unless it has come to a point that a division of property is to be made between employees and employers, it denotes a gross lack of attention to the hazards of employments and as to the fault for such hazards.

4. This section of the act authorizes a commission which to this time had been unheard of to classify our business and tell us how much money we shall pay to the state for the benefit of our own and other employees. We had always understood that no person could be required to pay money to the state, except as a tax or as a license fee, or an indemnity by reason of the character of the work, and that when such payments were required that the amount thereof, and the terms

and conditions of the payment thereof must be definitely fixed and ascertained by a legislative act so that the application and the provisions and terms of such act could be reviewed by a court as to its constitutionality and reasonableness. That the disposition of our property was protected, first, by our constitutions, and next by a legislature chosen directly by the people; and finally and ultimately that our rights in the matter could be placed before an impartial court.

5. Section 3 of the act provides that the fund created by the employers may be paid to an employee, even though his injuries are caused by the wrong of some third person, whether such third person be a citizen of the state of Washington, United States, or an alien. The outside visions we have had of the liability of an employer to an employee was that he must contribute where he was negligent or had failed in some statutory requirement to protect the employee. This section places the matter where the employer is not only an insurer of an employee, against the acts of employees, and against any injury which might be received upon property over which the employer has jurisdiction, but makes the employer an insurer of the employee against the wrongful acts of every person probably including the state of Washington itself.

6. Section 4 of the act arbitrarily fixes the amount of money which shall be paid by employers, it disregards questions of competition by the commodities, making the rate higher upon the manufacturers of certain building material than it is upon others and generally disregards those features and duties which are so vital to the success of a business. It is the law that even in concerns following a public calling that the rate to be charged or paid must be assessed upon an equal basis as to competing commodities.

7. Section 4 of the act provides that sufficient payments shall be made at one time or another during the year to entirely pay the injured employees. There is no limit to the amount which may be taken. It might be said that the limi-

tation of twenty dollars per month, and four thousand dollars mentioned in the schedule of awards to injured employees in section 5 is a limitation upon the amount which can be exacted from the employers. But it is apparent to this plaintiff in error that the limitation placed upon the awards is always subject to increase by any legislature which sees fit to increase the amount. In allowing legislation of the kind which we deem this to be, which authorizes one man to vote how much of another man's property he shall receive, we can see a peril threatening the industries of Washington which ought to require the maturest consideration by persons investing money in Washington. This danger is brought home to this plaintiff in error by the knowledge that in its employ it has daily two hundred fifty persons. Fifteen persons can be selected, which will include all employees, who could be relied upon not to increase their compensation at the expense of plaintiff in error if the way to do it honorably was open to them. We believe it fair to assume that the same proportion would carry through other industries. We do not believe that employers themselves could be controlled by allowing them to do merely what they believed to be reasonable with other persons any more than could employees, and for that reason constitutional compacts have always protected the employee and held the court open to him for any redress he believed himself entitled to. The department provided for the hearing of questions as to the amount of property to be taken from one person and given to another has always been under our constitution the impartial and disinterested courts, and thereby our courts have grown to be the great and powerful institutions they now are. It is our belief that an encroachment upon the rights of employers by taking the judicial questions of liability or nonliability from the court and placing it in the legislature will eventually call for acts of the legislature having the same tendency towards the employee, and then the whole matter will be taken from under the protection of the constitution and placed purely with the legislature. How absurd such a proposition would be is forcibly shown from the newspapers reciting the defense by persons clamoring against the constitution and

its provisions,—that they are being deprived of their constitutional rights. There never was a street orator haranguing against the constitution, who, when arrested for so doing, did not plead his constitutional rights to liberty of speech. Everyone has come to regard the constitution and the divisions of the government therein made in this same light. We find fault with particular provisions thereof, but as with any other rule of action which has been agreed upon and solemnly written and approved, we find that after all it is the best rule of action, and that deviations therefrom are fraught with many difficulties and dangers.

8. Section 4 of the act gives the department authority to at any time in the year come to any employer and tell him that it wants from him more money than it has taken in proportion from other employers in a like business, all that is necessary in order that the department do this is that the members of the department believe, or say that they believe, that his particular plant is more dangerous than other like plants. This provision not only violates all we had always believed was guaranteed to us by the constitution by giving the legislature authority to take our property, but goes further and gives a commission of three persons the authority if they see fit, to discriminate upon reasons which they believe to be sufficient. It may be said that it will not be presumed that public officers will violate their duty or use a discretion oppressively. But that is beside the point. Our constitution and our laws are meant to be so framed that these things cannot happen. And in this connection this act further provides that a discretionary matter passed on by the commission shall not be subject to review (Sec. 20).

9. Section 4 of the act further places it within the discretion of the department to declare in its classification to just which class every dollar of the pay roll should go, and authorizes it in case of a question in the minds of the commissioners to figure up a general average and collect that from the employers.

10. Section 5 of the act provides that every injured workman shall be paid at rates therein specified. The indigent condition of the employee does not matter. Who injured him does not matter. How long he has been employed does not matter; nothing matters except that he is injured and was employed to assist the employer in developing the state of Washington. It makes a workman the object of state aid; not through aiding and encouraging him to work, or through giving him protection, but by handing him charity money, making him a pensioner, teaching him that the state with its power will take from his employer the employers property and give it to him, not because of any special merit upon his own part, but because of his misfortune in being injured. All charities are founded upon misfortune. Pensions are rewards for valiant and faithful services. The giving of this money to the employee is a charity without a foundation. Instances are within the memory of counsel for plaintiff in error wherein persons suffering from misfortune have been proffered aid by counties and other institutions, and the persons have felt keenly and deeply insulted. That feeling is one of a true American. But once let a man come to believe that it is the duty of the government to guarantee his welfare, no matter what he does himself, and you develop a class of men who cannot support a government like ours. The government then rises above the citizens upon whom it depends, and destroys the very qualities in men which caused the republican form of government and caused the government to be in a position to discharge its functions.

11. Section 5 of the act arbitrarily fixes the amount to be paid to an employee in case of an injury without regard to the prior usefulness to himself of that employee. It also allows the commission to arbitrarily tell him when there is a diminution or termination of his disability; how much he is to be paid and when to be paid, and gives him no right to be heard. That is one of the matters placed by the statute within the discretion of the department and hence not reviewable under section 20. The employee, dissatisfied with the assess-

ment, would naturally be quite active in procuring an increase of them. The agitation of labor measures is popular. The employer cannot dodge it by overstepping the constitutional limitation in a belief that there the matter will stop, because once the constitution is overstepped, then the bridges are burned; there is no turning back. It then is simply a question of how much of my property are you going to vote that you want.

12. Section 6 of the act provides that in case of intentional injury to the employee produced by himself, that no award shall be paid to him and that if injuries result from the intention of the employer, the privilege is given of taking under the act and also of suing the employer. The determination of these questions is placed primarily with the commission and its findings are made *prima facie* correct (Sec. 20). In other words, it is presuming that a person intentionally commits a crime. This section is unfair in both directions. It places the employee in court, litigating not the question of his injuries, or the amount which he should receive in case of liability, but the correctness of a presumption that a department (not judicial), has passed correctly upon questions of a judicial nature. The employer the same way.

13. Section 8 of the act provides that if the employer defaults in making the payments, the employee may sue, or, by assignment, the state may sue, thus giving the state the right to prosecute and litigate a question which should be between an employee and an employer. The state is maintained in part by a tax upon the employer. The state has many advantages in court over a private person. In fact, by the act all defenses are abolished, when the action is brought by the state, and are not abolished when brought by the employee.

14. Section 9 provides that the employer shall pay an additional amount in case of his failure to safeguard. The determination of this question of fact is left to the commission subject to a court review with the limitations mentioned herein as to court reviews. The provision is unfair to the employer and employee alike in that the party aggrieved cannot be heard

in a court except to contest the rightfulness of a ruling of the department with a *prima facie* presumption against him.

15. Section 11 of the act prohibits any employer from making any contract with any employee, waiving any of the provisions of the said act.

16. Section 12 of the act allows payment upon an application and dispenses with the usual proof of dependency, etc., and puts the question of judicial ascertainment of who are dependents, etc., up to the commission, which commission may or may not order medical examinations as it sees fit (Sec. 13).

17. Section 15 of the act allows compulsory inspection of employers books and fixes a penalty for a refusal. It has always been our understanding that in a lawful private business our books could not be examined into except by our consent, or by a court of competent jurisdiction.

18. Section 20, authorizes a court review under certain restrictions. One of which is that the calling of a jury shall rest in the discretion of the court except as to litigation arising under certain sections. It does not authorize in any respect an investigation of questions of liability or the amount of liability by a jury.

19. Section 21 authorizes the appointment by the governor, of three commissioners to hold office for six years. These commissioners are authorized to appoint agents, in such places over the state as they see fit. The dangers of allowing this power to a head of any political party which happens to then be in office is too apparent to require argument.

Constitutional Provisions Violated.

Section 4 of article 4 of the Constitution of the United States, provides:

> "The United States shall guarantee to every state in this union a republican form of government, * * *"

The Workmen's Compensation Act seeks to confuse the republican form of government, and seeks to take private property of persons in a lawful enterprise, not by judicial action,

but because the legislature has declared that it is necessary to do so in the exercise of the police powers of the state. The legislature here seeks to usurp the functions of the judicial department of the government, to judicially construe the constitution of the state of Washington, and of the United States, and to declare liability arbitrarily without a wrongful act. Private property is taken without compensation and for a private use unless the police power vested in the state of Washington has the effect of reading into the constitutions of the state of Washington and the United States a proviso excepting the operation of the provisions thereof to such classes of persons, occupations and things as the legislature may deem advisable.

As far back as 1798, the supreme court of the United States in *Calder* v. *Bull*, 3 Dall. 386, was called upon to warn the people of the United States that the constitution must be held sacred and that no authority upon any pretext should be allowed to supersede the same. The following language is used:

> "The people of the United States erected their constitution or forms of government, to establish justice, to promote the general welfare, to secure the blessing of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it; the nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free Republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the Federal, or state, legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact, can not be

considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. A few instances will suffice to explain what I mean. A law that punishes a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause, or a law that takes property from A and gives it to B. It is against all reason and justice, for a people to entrust a legislature with such powers; and therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit of our state governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime, or violate the right of an antecedent lawful private contract; or the right of private property. To maintain that our federal, or state legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments."

Mr. Justice Story, in *Wilkinson* v. *Leland,* 2 Peters 627, said:

"That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people."

In *Kilbourn* v. *Thompson,* 13 Otto 168, Mr. Justice Miller said:

"It is believed to be one of the chief merits of the American system of written constitutional law, that all the

powers entrusted to government, whether state or national, are divided into the three grand departments of the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system, that the persons entrusted with power in any of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall, by the law of its creation, be limited to the exercise of the powers appropriate to its own department and no other. * * * In the main, however, that instrument, the model on which are constructed the fundamental laws of the states, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and judicial departments of the government. It also remains true, as a general rule, that the powers confided by the constitution to one of these departments can not be exercised by another. It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made, and it is believed not always without success. The increase in the number of states, in the population and wealth, and in the amount of power, if not in its nature to be exercised by the federal government, presents powerful and growing temptations to those to whom that exercise is intrusted, to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not intrusted to either of them."

We contend that the provision of the constitution guaranteeing to every state, a republican form of government, is violated by the allowance of legislation which directly places with the state legislature and a commission the entire determination of how much, and under what circumstances the private property of one person shall be taken and given to another.

The Seventh amendment to the Constitution of the United States provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. * * * "

Section 1 of the Fourteenth amendment to the Constitution of the United States provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

We treat the two quoted sections together, and although we are familiar with the holding of this court that the provision as to jury does not apply to proceedings in state courts, yet, we urge the same to your honors as material in this case for the reason that if constitutional, the act must be followed in actions in the federal courts within its provisions. It is well known that a question of negligence has always been one to be passed upon by a jury, and it does not require any extended citation to this court to illustrate the position taken by this court with regard to the right to a trial by jury in cases coming before it.

Thus, in *Wm. Parsons* v. *Bedford*, 3 Pet. 433, this court said:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such trial is, it is believed, incorporated into, and secured in every state constitution in the union.
>
> "By 'common law,' they meant what the constitution denominated in the third article, 'law'; not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit.
>
> "In a just sense the amendments then may well be construed to embrace all suits which are not of equity and

admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights."

In *Maxwell* v. *Dow*, 176 U. S. 581, it is said:

> "That a jury composed, as at common law, of twelve jurors, was intended by the sixth amendment to the federal constitution, there can be no doubt. *Thompson* v. *Utah*, 170 U. S. 343, 349. And as the right of trial by jury in certain suits at common law is preserved by the seventh amendment, such a trial implies that there shall be a unanimous verdict of twelve jurors in all federal courts where a jury trial is held. *American Pub. Co.* v. *Fisher*, 166 U. S. 464; *Springfield* v. *Thomas*, 166 U. S. 707."

The act unconditionally requires employers engaged in occupations enumerated therein, to make payment to a fund for the benefit of employees, without regard to any wrongful act of the employer. In addition to taking away all of his defenses, it makes him liable from the mere fact that he employs the person injured. He is given by this act no day in court to determine his liability for a failure to comply with the law, and is given no opportunity to be heard as to how much of his property should be taken, whether he is or is not at fault.

We contend that this amounts to depriving Mountain Timber Company of its property without due process of law, and denies to it the equal protection of the laws.

Due process of law has been held to be an administration of the law of the land; that is, an opportunity to be heard as to liability under the basic principles of the law. (See *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 517.) This does not mean merely that a man's property shall be taken from him, if it be found upon investigation that he is engaged in a certain lawful enterprise. We think it will be conceded that this act of the state of Washington does take property without due process of law, and takes private property without just compensation, and denies to defendant equal protection of law, unless it can be justified as a proper exercise of the police power. It has been impossible to obtain from a court a definition of police power which would control in a

case involving a different set of facts from those of the case in which such definition appears. It is sufficient to say that this power has been the justification under which the acts of legislatures have been allowed to do exactly what the constitution says they cannot do; in other words, every act which depends for its validity upon this so-called police power will be found upon its face to violate some constitutional provision, as the constitution is written and construed. The police power as applied in such cases amounts to nothing more nor less than a canon of construction adopted and enforced for the purpose of in certain instances evading the rigidity of constitutional provisions. It has been the justification, and we do not say wrongfully, of interference with the business of selling intoxicating liquors, with the business of railroads, inn-keepers, owners of ferry boats, plumbers, bakers, banking, etc., and finally the courts are asked to suspend the operation of the provisions of the state and federal constitutions as to all employments involving any risk or danger to an employee. This extension of the police power is in direct opposition to many authorities in the United States. All of the authorities put forward as sustaining the act in question will be found to involve either an occupation, the nature of which is semi-public, or the regulating of a business dangerous not only to the people who engage in it, but to the public generally. Such cases are not authorities, for the extension of the police power, or in other words, a suspension of the constitutional provisions as to all the industries of the state of Washington.

In *State* v. *Strasburg*, 60 Wash. 106, 110 Pac. 1020, the following definition of "Due Process of Law," is approved:

> "The exposition, however, of the term, 'due process of law,' or 'the law of the land,' by Mr. Webster, in the Dartmouth College case, has generally been accepted by both courts and law-writers, viz: 'By the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered

the law of the land.' Measured by this definition, the deficiencies in the act under consideration become at once apparent."

In *Jolliffe* v. *Brown*, 14 Wash. 155, 44 Pac. 149, the court considers an act relating to the recovery of damages for stock killed by railroad train. This court held invalid the provisions of the act which imposed double damages and required the payment of attorney's fees.

In the case of *Joseph Lochnor* v. *New York*, 198 U. S. 45, a law of the state of New York limiting employment in bakeries to sixty hours a week and ten hours a day was held to be an arbitrary interference with the freedom to contract guaranteed by the United States Constitution, which could not be sustained as a valid exercise of the police power to protect the public health, safety, morals, or general welfare. Mr. Justice Peckham in this case says:

> "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise, the fourteenth amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint."

In the case of *Louisville & N. R. R. Co.* v. *Baldwin*, 5 So. 311, 85 Ala. 619, held that an act which attempted to require railroad companies to pay for the examination to be made as to the fitness of persons seeking employment with them was unconstitutional. A decision in this case could have been put upon the broad ground of a precaution for the public safety, but inasmuch as it required a railroad company to pay for services rendered to others, the line was drawn and the act held invalid.

Upon the question of due process of law, the case of *Wadsworth* v. *Union Pacific R. R.*, 18 Colo. 600, 33 Pac. 515,

is an authority. An act made the defendant liable for stock killed, without regard to negligence or wrongful act. It was held void. It is said:

> "In these respects the statute denies to railroad companies the 'equal protection of the laws.' It provides that they may be subjected to liability and to a judgment without opportunity for hearing or trial according to 'the law of the land' and thus they may be deprived of their property 'without due process of law.' Such a statute can not be upheld as constitutional. In this connection the language of Mr. Webster is most appropriate: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial.' *Const. U. S.*, Art. 14; *Const. Col.*, Art. 2, 25; *Cooley, Const. Lim.*, (6th Ed.) 431; *East Kingston* v. *Towle*, 48 N. H. 65; *County of San Mateo* v. *Southern Pacific R. Co.; 8 Amer. & Eng. Ry. Cas. 1; Railway Co.* v. *Outcalt*, (Col. App.) 31 Pac. Rep. 177; *Graves* v. *Ry. Co.*, 5 Mont. 556; *6 Pac. Rep. 16; Dacres* v. *Navigation Co.*, (Wash.) 20 Pac. 601."

In *Denver Ry.* v. *Outcalt*, (Colo.) 31 Pac. 177, the court considered a statute which imposed absolute liability upon a railway for animals killed. There was no provision requiring fencing. The act was held unconstitutional. It is said:

> "Their operation, under all circumstances, and handled with the greatest care, being dangerous to life and property, hence the necessity of precautionary measures and legislation requiring great care and the best mechanical appliances and skill. Such legislative and precautionary measures are the proper and legitimate exercise of the police powers of the state, but laws of that kind must define the duties and requirements, may require the fencing of roads, putting in cattle guards, prescribe a requisite amount of skill in operatives, and perfection in machinery and appliances, making such laws penal, and fixing a penalty for violation; but the statute under consideration is not of that character."

In *Gulf Railway* v. *Ellis*, 165 U. S. 150, the supreme court of the United States held that a statute imposing an attorney's fee not to exceed ten dollars, upon railway corporations omitting to pay claims after presentation, was unconstitutional. The opinion by Mr. Justice Brewer, brings out the thought which must be borne in mind in this case that it was not the

matter of the ten dollars, but that it was the matter of the principle which the court was asked to approve. It was said:

> "It is true the amount of the attorney's fee which may be charged is small, but if the state has the power to thus mulct them in a small amount, it has equal power to do so in a larger sum. The matter of amount does not determine the question of right, and the party who has a legal right may insist upon it, if only a shilling be involved. As well said by Mr. Justice Bradley, in *Boyd* v. *United States*, 116 U. S. 616-635: 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property shall be liberally construed. A close and literal construction deprives them of half of their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *'obsta principiis.'* While good faith and knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation, is to make the protecting clauses of the fourteenth amendment a mere rope of sand, in no manner restraining state action."

In *Zeigler* v. *Southern and Northern Alabama Ry. Co.*, 58 Ala. 594, a statue attempted to make the railroad liable for property killed upon its track, without regard to questions of negligence or wrongful act. It was held that the provisions of the constitution were not avoided by a plea of the police power.

As to what constitutes due process of law, showing that it is not a compliance with a mere act of the legislature, Mr. Justice Ruffin, of North Carolina, is quoted with approval as follows:

> "The terms 'law of the land' do not mean merely an act of the general assembly. If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer than to be

> taken, imprisoned, disseized of his freehold, liberties and privileges; be outlawed, exiled, destroyed, and be deprived of his property, his liberty and his life without crime, yet all this he may suffer if an act of assembly simply denouncing those penalties on particular persons, or a particular class of persons, be, in itself, a law of the land within the sense of the constitution; for what is, in that sense, the law of the land, must be duly observed by all and enforced by the courts. * * * The clause itself means that such legislative acts as profess in themselves directly to punish persons, or to deprive the citizens of his property without trial, before the judicial tribunals and a decision upon the matter of right, as determined by the laws under which it rested according to the course, mode and usages of the common law as derived from our forefathers, are not effectually 'laws of the land' for those purposes."

In *Birmingham* v. *Parsons*, 13 So. 602, 100 Ala. 662, an act fixing absolute liability upon the railroad for cattle which were injured upon its track, without regard to questions of negligence or wrongful acts, was invalid.

A similar case is *Gibbs* v. *Tally*, (Cal.) 65 Pac. 970.

Railway Co. v. *Morris*, 65 Ala. 193.

Bielenberg v. *Ry. Co.*, 8 Mont. 271, 20 Pac. 314.

In *Bennett* v. *Ford*, 47 Ind. 264, and *Brown* v. *Collins*, 53 N. H. 442, it was held that an owner of a team of horses which without fault ran away was not liable for damage done.

In *Lewis* v. *R. R. Co.*, (Mich.) 19 N. W. 744, and *Steffen* v. *Ry. Co.*, (Wis.) 50 N. W. 348, the same principle is laid down.

> "Under the mere guise of a statute to protect against wrong, the legislature can not arbitrarily strike down private rights, and invade personal freedom or confiscate private property. The police power must be exercised within its appropriate sphere, and by appropriate methods. *People* v. *Arensberg*, 103 N. Y. 399, 8 N. E. 736. This power can be exercised only to promote the public good, and is always subject to judicial scrutiny. *Forester* v. *Scott*, 136 N. Y. 577, 584; 32 N. E. 976. Whenever the legislature passes an act which transcends the limits of the police power, it is the duty of the judiciary to pronounce it invalid, and to nullify the legislative attempt to invade the citizens' rights."
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> *Colon* v. *Lisk*, (N. Y.) 47 N. E. 302, 304.

"Neither the legislature nor municipality can, under the guise of police regulations, arbitrarily invade private property or personal rights; and when such regulations are called in question the test should be whether they have some relation to the public health or public safety, and whether such is, in fact, the end sought to be attained. The means used must be such as are reasonably necessary for the accomplishment of the purpose, and must not be unduly oppressive upon individuals or the public. Every act, order, or ordinance is subject to review by the courts, and, if the power granted by the constitution is exceeded by the legislature or municipality, it is the duty of the courts to declare such act, order or ordinance invalid. Under the guise of protecting the public interests, neither the legislature nor the municipality can arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful business and occupations."

California, etc., Co. v. *Sanitary, etc., Works,* 126 Fed. 29, 34.

"It follows that a statute, to be within the power, must be responsive to some public necessity, suitable to subserve it, and reasonable in its operation upon the persons whom it affects."

Republic, etc., Co. v. *State,* (Ind.) 66 N. E. 1005, 1007-8.

"Again, when the validity of a statute of this sort is under consideration, it is always open to the court to consider, among other things, whether the act bears any reasonable relation to the public purpose sought to be accomplished, and a forced or strained relation is not enough."

State v. *Dalton,* (R. I.) 46 Atl. 234.

"The inquiries to be solved in testing an enactment purporting to be for the promotion of the public health, as to whether it is fairly within the field of police power, are well stated at 143 *Freund, Police Power,* thus: 'Does a danger exist? Is it of sufficient magnitude? Does it concern the public? Does the proposed measure tend to remove it? Is the restraint or requirement in proportion to the danger? Is it possible to secure the object sought without impairing essential rights and principles?' "

State v. *Redmon,* (Wis.) 14 L. R. A. (N. S.) 229.

In *State* v. *Smith*, 42 Wash. 237, it was held that an act regulating the business of plumbing and requiring payment of a fee to engage in that business infringed both the state and federal constitution.

This court in *Lawton* v. *Steel*, 152 U. S. 137, laid down the rule which should control this case and which should cause the court to hold that the act in question is not a proper exercise of the police power. In the case mentioned the rule is thus stated:

> "To justify the state in thus interposing its authority in behalf of the public, it must appear: First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

The rule as here announced has not been extended, or changed, by this court although in some later cases some businesses have been held to be within the police power, which had not previously thereto been so held.

Thus the case of *Noble State Bank* v. *Haskell*, 219 U. S. 104, which in fact deals with a public business. The opinion in the case in this court proceeds upon the theory that the power of restricting and regulating the business of banking has never been denied. The opinion filed on rehearing shows that this case has been much misunderstood and has been taken as applying a principle which it did not intend to apply. It is there said:

> "The analysis of the police power, whether correct or not, was intended to indicate an interpretation of what has taken place in the past, not to give a new or wider scope to the power."

The fact that the bank guaranty cases did not enunciate a wider principle, but only refer to the banking business is well

shown by this court in a case decided after the bank guaranty cases, *Engel* v. *O'Malley,* 219 U. S. 128.

In the above case it is said:

> "We presume that the money deposited with the plaintiff is not drawn upon by checks, so that a part of the argument in *Noble State Bank* v. *Haskell,* just decided, may not apply. On the other hand, experience has shown that the protection of such depositors against fraud, which is the purpose running through the statute, is especially needed by at least that class of them with whom the persons hit by the statute largely deal. The case cited establishes that the state may regulate that business and may take strong measures to render it secure."

We contend that the making of the Compensation Act in question compulsory, is not a thing which the interests of the public generally require; that it is not reasonably necessary for the accomplishment of the purpose, and it is unduly oppressive upon individuals, and that the same arbitrarily interferes with private business and imposes unnecessary restrictions upon the same. This is conclusively shown by the elective clauses in the many other acts.

Compensation Laws of the Various States.

A comparison of the acts of the various states with the act in question, shows a radical difference in that the act in question is made compulsory and the employer and employee are compelled to come under the act whether voluntarily or involuntarily. Many of the courts of the various states which have passed upon the constitutionality of the acts of other states have made a point of the fact that the acts which they were considering were elective acts and for that reason did not infringe constiutional guarantees. Thus this court in the case of *The Jeffrey Mfg. Co.* v. *Henry O. Blagg,* decided January 5, 1915, 5 U. S. adv. ops. 1915, p. 167, being a case in which this court held the Ohio act constitutional, say:

> "No employer is obliged to go into this plan. He may stay out of it altogether if he will."

In *Borgins* v. *Falk Company,* 147 Wis. 327, 133 N. W. 209, being a case in which the constitutionality of the Wisconsin act is sustained, the court say:

"Passing to the consideration of the contentions made in the present case, we note *in limine*, that this is not a compulsory law. No employer is compelled to pay damages to an employee without having had his day in court."

In *State* v. *Creamer*, 85 Ohio State 349, 97 N. E. 602, the supreme court of Ohio in holding valid the Ohio act, say:

"It is urgently insisted that while the law is apparently permissive, and leaves its operation to the election of employers and employees, it is really coercive, and upon this premise much persuasive argument against the validity of the law is based. This is an important question in the case."

In *Sexton* v. *Newark District Telegraph Company*, (N. J.) 86 Atl. 451, the supreme court of New Jersey in sustaining the New Jersey act, say:

"Objection is made to this section upon the ground that it makes the employer liable to pay its employees compensation for injuries which were not due to the negligence of the employer. It is argued that such a scheme can only be binding, upon the employer with his consent, for otherwise the award of compensation provided by section 2 deprives him of his property without 'due process of law'. This contention as an objection to the constitutionality of the act is wholly without substance and is apparently founded upon an insufficient consideration of the scheme of the statute. Under the act neither the employer nor the employee is bound to accept the provisions of section 2 unless he chooses to do so."

In *Deibeikis* v. *Link-Belt Company*, 261 Ill. 454, 104 N. E. 211, the supreme court of Illinois in holding valid the Illinois act, say:

"Taking up the points raised by appellant in the order in which they have been set out above, we are unable to see where it can be contended that this act is an attempt to exercise the police power. It will be observed that the act is elective, and that no employer or employee is compelled to accept or come within its provisions unless he chooses to do so. Therefore, unless the employer or the employee elects to come within the provisions of the act, he is not affected by any of the provisions thereof. * * * The other objections urged may all be answered by the statement that the act is elective and not compulsory. Were the act deprived of its

elective feature and made compulsory upon every employer and employee engaged in the enterprises enumerated in section 2, very different and more serious questions would be presented."

In *Re Opinion of Judges,* 209 Mass. 607, 96 N. E. 308, the supreme court of Massachusetts in holding valid the Massachusetts act, say:

"There is nothing in the act which compels an employer to become a subscriber to the Association, or which compels an employee to waive his right of action at common law and accept the compensation provided for in the act. In this respect the act differs wholly, so far as the employer is concerned, from the New York statute above referred to."

In the *Kentucky State Journal Company* v. *Workmen's Compensation Board* (Ky.) 170 S. W. 1166, the court of appeals of Kentucky held unconstitutional the Kentucky act on the ground that by taking away the defenses of the employer it made the act compulsory which violated the special constitutional provision of that state, which was to the effect that the general assembly did not have authority to limit the amount of recovery for personal injuries.

In *Cunningham* v. *Northwestern Improvement Company,* (Mont.) 119 Pac. 554, the supreme court of Montana held the Montana act unconstitutional, not because it was compulsory but because it allowed an election on the part of the employee, whereas no such election was allowed on the part of the employer.

In *Matheson* v. *Minneapolis Street Railway Company,* (Minn.) 148 N. W. 71, the supreme court of Minnesota in sustaining the Minnesota act, say:

"These propositions become binding contracts in respect to all who accept them, and remain as continuing offers to those who have not accepted them. An employer or employee, who, at his option, may secure all the advantages possessed by any other, is hardly in a position to claim that he is discriminated against."

In *Ives* v. *South Buffalo Railroad Company,* 201 N. Y. 271, 94 N. E. 431, the supremec ourt of New York held the New

York act unconstitutional and void because it was compulsory and hence deprived employers of their property without due process of law.

In *State ex rel. Davis-Smith Company* v. *Clausen,* (Wash.) 117 Pac. 1101, the supreme court of Washington held the act in question here constitutional.

In *Shade* v. *Ash Grove Portland Lime & Cement Company,* (Kan.) 144 Pac. 249, the supreme court of Kansas in holding valid the Kansas act, say:

> "It should also be observed that an employee is not deprived of the right to the benefit of the factory act nor of common law remedies without his consent. They remain open to his election, if made before the injury, by filing a declaration 'that he elects not to accept thereunder,' that is, under the provisions of the compensation act. * * * Briefly it may be said that the operation of the system of compensation provided by the statute rests upon the free consent of employer and employee, given in the manner provided by the act. Without such consent on his part, the employee retains all his remedies under common and statutory law. It is a matter of election."

In a bulletin of the United States Bureau of Labor Statistice, published under date of December 23, 1913, being Workmen's Insurance and Compensation, series No. 5, at page 48, a summary of a table is given showing that twenty-two states have compensation laws, as follows:

No. 1—Connecticut, an elective law.

No. 2—Illinois, an elective law.

No. 3—Iowa, an elective law.

No. 4—Kansas, an elective law.

No. 5—Michigan, an elective law.

No. 6—Minnesota, an elective law.

No. 7—Nebraska, an elective law.

No. 8—New Hampshire, an elective law.

No. 9—New Jersey, an elective law.

No. 10—New York, an elective law.

No. 11—Rhode Island, an elective law.

No. 12—Wisconsin, an elective law.

No. 13—Arizona, a compulsory law as to especially dangerous classes, but employers allowed to make special contracts.

No. 14—California, a compulsory law, but employer may make special contracts or may insure with casualty companies.

No. 15—Maryland, an elective act.

No. 16—Massachusetts, an elective act.

No. 17—Nevada, an elective act.

No. 18—Oregon, an elective act.

No. 19—Texas, an elective act.

No. 20—West Virginia, an elective act.

No. 21—Ohio, an elective act, which by an amendment was made compulsory upon certain employers but they could maintain casualty insurance instead if desired.

No. 22—Washington, a compulsory act.

From the foregoing it is seen that Washington is the only state which has a compulsory compensation act which is by the legislature made exclusive of any other procedure or remedy by employer and employee, and upon this we say to your honors that the distinction thus made is a vital one because if the legislature should see fit at any time to increase the compensation to the employee to any great extent, the employer under an elective law could refuse to contribute, whereas, under the Washington law, he would have no remedy except to pay, no matter how high the legislature saw fit to make his contribution. In this connection the court should bear in mind that it is a known fact that the employees as a class have a great many more votes than the employers, and that if the constitutionality of a compulsory act is once sustained by the supreme court of the United States, that the employees through the legislature or by initiative act will naturally and surely raise the compensation which they are to receive in the event of injury.

CONCLUSION

In conclusion we submit that the arguments which we have advanced to your honors under the various heads, cannot be said to be objections to the policy of the act which the judgment of the legislature controls, because to so hold would be to say that the legislature is supreme, and that it might pass and cause to be enforced any statute it saw fit, while on the contrary we submit that the objections which we have urged are all of them ones which this court may and should consider in arriving at its conclusion in this case.

We urge upon your honors that a compulsory compensation law such as the one in question, is contrary to both the letter and the spirit of the federal constitution, and is an act which is well calculated to become a menace if its principle of compulsion is approved, because it allows no escape from a compliance with its provisions, no matter how difficult or costly such a compliance may be made by either future legislatures or the now common initiative acts.

We urge that the judgment of the supreme court of Washington should be reversed upon the ground that the act in question is unconstitutional and void.

Respectfully submitted,

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APPENDIX A.

TEXT OF COMPENSATION LAW

SESSION LAWS 1911

CHAPTER 74

(H. B. 14.)

AN ACT relating to the compensation of injured workmen in our industries, and the compensation to their dependents where such injuries result in death, creating an industrial insurance department, making an appropriation for its administration, providing for the creation and disbursement of funds for the compensation and care of workmen injured in hazardous employment, providing penalties for the non-observance of regulations for the prevention of such injuries and for violation of its provisions, asserting and exercising the police power in such cases, and, except in certain specified cases, abolishing the doctrine of negligence as a ground for recovery of damages against employers, and depriving the courts of jurisdiction of such controversies, and repealing sections 6594, 6595, and 6596 of Remington and Ballinger's Annotated Codes and Statutes of Washington, relating to employes in factories, mills or workshops where machinery is used, actions for the recovery of damages and prescribing a punishment for violation thereof.

Be it enacted by the Legislature of the State of Washington:

Section 1. *Declaration of Police Power.*

The common law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage-worker. The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the

premises are withdrawn from private controversy and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided.

Sec. 2. *Enumeration of Extra Hazardous Works.*

There is a hazard in all employment, but certain employments have come to be, and to be recognized as being inherently constantly dangerous. This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are within the legislative jurisdiction of the state, in the following enumeration, and they are intended to be embraced within the term "extra hazardous" wherever used in this act, to-wit:

Factories, mills and workshops where machinery is used; printing, electrotyping, photo-engraving and stereotyping plants where machinery is used; foundries, blast furnaces, mines, wells, gas works, waterworks, reduction works, breweries, elevators, wharves, docks, dredges, smelters, powder works; laundries operated by power; quarries; engineering works; logging, lumbering and ship building operations; logging, street and interurban railroads; buildings being constructed, repaired, moved or demolished; telegraph, telephone, electric light or power plants or lines, steam heating or power plants, steamboats, tugs, ferries and railroads. If there be or arise any extra hazardous occupation or work other than those hereinabove enumerated, it shall come under this act, and its rate of contribution to the accident fund hereinafter established, shall be, until fixed by legislation, determined by the department hereinafter created, upon the basis of the relation which the risk involved bears to the risks classified in section 4.

Sec. 3. *Definitions.*

In the sense of this act words employed mean as here stated, to-wit:

Factories mean undertakings in which the business of working at commodities is carried on with power-driven machinery, either in manufacture, repair or change, and shall include the premises, yard and plant of the concern.

Workshop means any plant, yard, premises, room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise in or incidental to the process of making, altering, repairing, printing or ornamenting, finishing or adapting for sale or otherwise any article or part of article, machine or thing, over which premises, room or place the employer of the person working therein has the right of access or control.

Mill means any plant, premises, room or place where machinery is used, any process of machinery, changing, altering or repairing any article or commodity for sale or otherwise, together with the yards and premises which are a part of the plant, including elevators, warehouses and bunkers.

Mine means any mine where coal, clay, ore, mineral, gypsum or rock is dug or mined underground.

Quarry means an open cut from which coal is mined or clay, ore, mineral, gypsum, sand, gravel or rock is cut or taken for manufacturing, building or construction purposes.

Engineering work means any work of construction, improvement or alteration or repair of buildings, structures, streets, highways, sewers, street railways, railroads, logging roads, interurban railroads, harbors, docks, canals; electric, steam or water power plants; telegraph and telephone plants and lines; electric light or power lines, and includes any other works for the construction, alteration or repair of which machinery driven by mechanical power is used.

Except when otherwise expressly stated, employer means any person, body of persons, corporate or otherwise, and the

legal representatives of a deceased employer, all while engaged in this state in any extra hazardous work.

Workman means every person in this state, who after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant, or, he being in the course of his employment, away from the plant of his employer; Provided, however, That if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case. Any such cause of action assigned to the state may be prosecuted or compromised by the department, in its discretion. Any compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department.

Any individual employer or any member or officer of any corporate employer who shall be carried upon the pay roll at a salary or wage not less than the average salary or wage named in such payroll and who shall be injured, shall be entitled to the benefit of this act as and under the same circumstances as and subject to the same obligations as a workman.

Dependent means any of the following named relatives of a workman whose death results from any injury and who leaves surviving no widow, widower, or child under the age

of sixteen years, viz.: invalid child over the age of sixteen years, daughter, between sixteen and eighteen years of age, father, mother, grandfather, grandmother, step-father, step-mother, grandson, granddaughter, step-son, step-daughter, brother, sister, half-sister, half-brother, niece, nephew, who, at the time of the accident are dependent, in whole or in part, for their support upon the earnings of the workman. Except where otherwise provided by treaty, aliens, other than father or mother, not residing within the United States at the time of the accident, are not included.

Beneficiary means a husband, wife, child or dependent of a workman, in whom shall vest a right to receive payment under this act.

Invalid means one who is physically or mentally incapacitated from earning.

The word "child," as used in this act, includes a posthumous child, a child legally adopted prior to the injury, and an illegitimate child legitimated prior to the injury.

The words injury or injured, as used in this act, refer only to an injury resulting from some fortuitous event as distinguished from the contraction of disease.

Sec. 4. *Schedule of Contribution.*

Insomuch as industry should bear the greater portion of the burden of the cost of its accidents, each employer shall, prior to January 15th of each year, pay into the state treasury, in accordance with the following schedule, a sum equal to a percentage of his total pay roll for that year, to-wit: (the same being deemed the most accurate method of equitable distribution of burden in proportion to relative hazard):

CONSTRUCTION WORK.

Tunnels; bridges; trestles; sub-aqueous works; ditches and canals (other than irrigation without blasting); dock excavation; fire escapes; sewers; house moving; house wrecking	.065
Iron, or steel frame structures or parts of structures	.080
Electric light or power plants or systems; telegraph or telephone systems; pile driving; steam railroads	.050

Steeples, towers or grain elevators, not metal framed; dry-docks without excavation; jetties; breakwaters; chimneys; marine railways; waterworks or systems; electric railways with rock work or blasting; blasting; erecting fireproof doors or shutters ..... .050

Steam heating plants; tanks, water towers or windmills, not metal frames .... .040

Shaft sinking ..... .060

Concrete buildings; freight or passenger elevators; fireproofing of buildings; galvanized iron or tin work; gas works, or systems; marble, stone or brick work; road making with blasting; roof work; safe moving; slate work; outside plumbing work; metal smokestacks or chimneys ..... .050

Excavations not otherwise specified; blast furnaces... .040

Street or other grading; cable or electric street railways without blasting; advertising signs; ornamental metal work in buildings ..... .035

Ship or boat building or wrecking with scaffolds; floating docks ..... .045

Carpenter work not otherwise specified ..... .035

Installation of steam boilers or engines; placing wire in conduits; installing dynamos; putting up belts for machinery; marble, stone or tile setting, inside work; mantel setting; metal ceiling work; mill or ship wrighting; painting of buildings or structures; installation of automatic sprinklers; ship or boat rigging; concrete laying in floors, foundations or street paving; asphalt laying; covering steam pipes or boilers; installation of machinery not otherwise specified ..... .030

Drilling wells; installing electrical apparatus or fire alarm systems in buildings; house heating or ventilating systems; glass setting; building hot houses; lathing; paper hanging; plastering; inside plumbing; wooden stair building; road making ..... .020

OPERATION (INCLUDING REPAIR WORK) OF

(All combinations of material take the higher rate when not otherwise provided.)

Logging railroads; railroads; dredges; interurban electric railroads using third rail system; dry or floating docks ..... .050

Electric light or power plants; interurban electric railroads not using third rail system; quarries ..... .040

Street railways, all employees; telegraph or telephone

systems; stone crushing; blasting furnaces; smelters; coal mines; gas works; steamboats; tugs; ferries	.030
Mines, other than coal; steam heating or power plants	.025
Grain elevators; laundries; waterworks; paper or pulp mills; garbage works	.020

FACTORIES USING POWER-DRIVEN MACHINERY

Stamping tin or metal	.045
Bridge work; railroad car or locomotive making or repairing; cooperage; logging with or without machinery; saw mills; shingle mills; staves; veneer; box; lath; packing cases; sash, door or blinds; barrel; keg; pail; basket; tub; wooden ware or wooden fibre ware; rolling mills; making steam shovels or dredges; tanks; water towers; asphalt; building material not otherwise specified; fertilizer; cement; stone with or without machinery; kindling wood; masts and spars with or without machinery; canneries, metal stamping extra; creosoting works; pile treating works	.025
Excelsior; iron, steel, copper, zinc, brass or lead articles or wares not otherwise specified; working in wood not otherwise specified; hardware; tile; brick; terra cotta; fire clay; pottery; earthenware; porcelain ware; peat fuel; brickettes	.020
Breweries; bottling works; boiler works; foundries; machine shops not otherwise specified	.020
Cordage; working in food stuffs, including oils, fruits and vegetables; working in wool, cloth, leather, paper, broom, brush, rubber or textiles not otherwise specified	.015
Making jewelry, soap, tallow, lard, grease, condensed milk	.015
Creameries; printing; electrotyping; photo-engraving; lithographing	.015

MISCELLANEOUS WORK

Stevedoring; longshoring	.030
Operating stock yards, with or without railroad entry; packing houses	.025
Wharf operation; artificial ice, refrigerating or cold storage plants; tanneries; electric systems not otherwise specified	.020
Theatre stage employes	.015
Fire works manufacturing	.050
Powder works	.100

The application of this act as between employers and workmen shall date from and include the first day of October, 1911. The payment for 1911 shall be made prior to the day last named, and shall be preliminarily collected upon the pay roll of the last preceding three months of operation. At the end of each year an adjustment of accounts shall be made upon the basis of the actual pay roll. Any shortage shall be made good on or before February 1st, following. Every employer who shall enter into business at any intermediate day shall make his payment for the initial year or portion thereof before commencing operation; its amount shall be calculated upon his estimated pay roll, and adjustment shall be made on or before February 1st of the following year in the manner above provided.

For the purpose of such payments accounts shall be kept with each industry in accordance with the classification herein provided and no class shall be liable for the depletion of the accident fund from accidents happening in any other class. Each class shall meet and be liable for the accidents occurring in such class. There shall be collected from each class as an initial payment into the accident fund as above specified on or before the 1st day of October, 1911, one-fourth of the premium of the next succeeding year, and one-twelfth thereof at the close of each month after December, 1911: Provided, Any class having sufficient funds credited to its account at the end of the first three months or any month thereafter, to meet the requirements of the accident fund, that class shall not be called upon for such month. In case of accidents occurring in such class after lapsed payment or payments said class shall pay the said lapsed or deferred payments commencing at the first lapsed payment, as may be necessary to meet such requirements of the accident fund.

The fund thereby created shall be termed the "accident fund" which shall be devoted exclusively to the purpose specified for it in this act.

In that the intent is that the fund created under this section shall ultimately become neither more nor less than self-

supporting, exclusive of the expense of administration, the rates in this section named are subject to future adjustment by the legislature, and the classifications to re-arrangement following any relative increase or decrease of hazard shown by experience.

It shall be unlawful for the employer to deduct or obtain any part of the premium required by this section to be by him paid from the wages or earnings of his workmen or any of them, and the making or attempt to make any such deductions shall be a gross misdemeanor. If, after this act shall have come into operation, it is shown by experience under the act, because of poor or careless management, any establishment or work is unduly dangerous in comparison with other like establishments or works, the department may advance its classification of risks and premium rates in proportion to the undue hazard. In accordance with the same principle, any such increase in classification or premium rate, shall be subject to restoration to the schedule rate. Any such change in classification of risks or premium rates, or any change caused by change in the class of work, occurring during the year shall, at the time of the anual adjustment, be adjusted by the department in proportion to its duration in accordance with the schedule of this section. If, at the end of any year, it shall be seen that the contribution to the accident fund by any class of industry shall be less than the drain upon the fund on account of that class, the deficiency shall be made good to the fund on the 1st day of February of the following year by the employers of that class in proportion to their respective payments for the past year.

For the purposes of such payment and making good of deficit the particular classes of industry shall be as follows:

CONSTRUCTION WORK.

Class 1. Tunnels; sewer; shaft sinking; drilling wells.

Class 2. Bridges; mill wrighting; trestles; steeples, towers or grain elevators not metal framed; tanks, water towers, wind-mills not metal framed.

Class 3. Sub-aqueous works; canal other than irrigation or docks with or without blasting; pile driving; jetties; breakwaters; marine railways.

Class 4. House moving; house wrecking; safe moving.

Class 5. Iron or steel frame structures or parts of structures; fire escapes; erecting fire-proof doors or shutters; blast furnaces; concrete chimneys; freight or passenger elevators; fire proofing of building; galvanized iron or tin work; marble, stone or brick work; roof work; slate work; plumbing work; metal smoke stacks or chimneys; advertising signs; ornamental metal work in buildings; carpenter work not otherwise specified; marble, stone or tile setting; mantel setting; metal ceiling work; painting of buildings or structures, concrete laying in floors or foundations; glass setting; building hot houses; lathing; paper hanging; plastering; wooden stair building.

Class 6. Electric light and power plants or systems; telegraph or telephone systems; cable or electric railways with or without rock work or blasting waterworks or systems; steam heating plants; gas works or systems; installation of steam boilers or engines; placing wires in conduits; installing dynamos; putting up belts for machinery; installing of automatic sprinklers; covering steam pipes or boilers; installation of machinery not otherwise specified; installing electrical apparatus or fire alarm systems in buildings; house heating or ventilating systems.

Class 7. Steam railroads; logging railroads.

Class 8. Road making; street or other grading; concrete laying in street paving; asphalt laying.

Class 9. Ship or boat building with scaffolds; ship wrighting; ship or boat rigging; floating docks.

OPERATION (INCLUDING REPAIR WORK) OF

Class 10. Logging; saw mills; shingle mills; lath mills; masts and spars with or without machinery.

Class 12. Dredges; dry or floating docks.

Class 13. Electric light or power plants or systems; steam heat or power plants or systems; electric systems not otherwise specified.

Class 14. Street railways.

Class 15. Telegraph systems; telephone systems.

Class 16. Coal mines.

Class 17. Quarries; stone crushing; mines other than coal.

Class 18. Blast furnaces; smelters; rolling mills.

Class 19. Gas works.

Class 20. Steamboats; tugs; ferries.

Class 21. Grain elevators.

Class 22. Laundries.

Class 23. Water works.

Class 24. Paper or pulp mills.

Class 25. Garbage works; fertilizer.

FACTORIES (USING POWER-DRIVEN MACHINERY).

Class 26. Stamping tin or metal.

Class 27. Bridge work; making steam shovels or dredges; tanks; water towers.

Class 28. Railroad car or locomotive making or repairing.

Class 29. Cooperage; staves; veneer; box; packing cases; sash, door or blinds ; barrel; keg; pail; basket; tub; wood ware or wood fibre ware; kindling wood; excelsior; working in wood not otherwise specified.

Class 30. Asphalt.

Class 31. Cement; stone with or without machinery; building material not otherwise specified.

Class 32. Canneries of fruits or vegetables.

Class 33. Canneries of fish or meat products.

Class 34. Iron, steel, copper, zinc, brass or lead articles or wares; hardware; boiler works; foundries; machine shops not otherwise specified.

Class 35. Tile; brick; terra cotta; fire clay; pottery; earthenware; porcelain ware.

Class 36. Peat fuel; brickettes.

Class 37. Breweries; bottling works.

Class 38. Cordage; working in wool, cloth, leather, paper, brush, rubber or textile not otherwise specified.

Class 39. Working in food stuffs, including oils, fruits, vegetables.

Class 40. Condensed milk; creameries.

Class 41. Printing; electrotyping; photo-engraving; engraving; lithographing; making jewelry.

Class 42. Stevedoring; longshoring; wharf operation.

Class 43. Stock yards; packing houses, making soap, tallow, lard, grease; tanneries.

Class 44. Artificial ice, refrigerating or cold storage plants.

Class 45. Theatre stage employees.

Class 46. Fire works manufacturing; powder works.

Class 47. Creosoting works; pile treating works.

If a single establishment or work comprises several occupations listed in this section in different risk classes, the premium shall be computed according to the pay roll of each occupation if clearly separable; otherwise an average rate of premium shall be charged for the entire establishment, taking into consideration the number of employes and the relative hazards. If an employer besides employing workmen in extra hazardous employment shall also employ workmen in employments not extra hazardous the provisions of this act shall apply only to the extra hazardous departments and employments and the workmen employed therein. In computing the pay roll the entire compensation received by every workman employed in extra hazardous employment shall be included, whether it be in the form of salary, wage, piece work, overtime, or any allowance in the way of profit-sharing, premium or otherwise, and whether payable in money, board, or otherwise.

Sec. 5. *Schedule of Awards.*

Each workman who shall be injured whether upon the premises or at the plant, or he being in the course of his em-

ployment, away from the plant of his employer, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with the following schedule, and, except as in this act otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever.

COMPENSATION SCHEDULE.

(a) Where death results from the injury the expenses of burial shall be paid in all cases, not to exceed $75.00 in any case. and

(1) If the workman leaves a widow or invalid widower, a monthly payment of $20.00 shall be made throughout the life of the surviving spouse, to cease at the end of the month in which remarriage shall occur; and the surviving spouse shall also receive $5.00 per month for each child of the deceased under the age of sixteen years at the time of the occurrence of the injury until such minor child shall reach the age of sixteen years, but the total monthly payment under this paragraph (1) of subdivision (a) shall not exceed $35.00. Upon remarriage of a widow she shall receive, once and for all, a lump sum equal to twelve times her monthly allowance, viz.: the sum of $240.00, but the monthly payment for the child or children shall continue as before.

(2) If the workman leaves no wife or husband, but a child or children under the age of sixteen years, a monthly payment of $10.00 shall be made to each such child until such child shall reach the age of sixteen years, but the total monthly payment shall not exceed $35.00, and any deficit shall be deducted proportionately among the beneficiaries.

(3) If the workman leaves no widow, widower, or child under the age of sixteen years, but leaves a dependent or dependents, a monthly payment shall be made to each dependent equal to fifty per cent of the average monthly support actually received by such dependent from the workman during the twelve months next preceding the occurrence of the injury, but the total payment to all dependents in any

case shall not exceed $20.00 per month. If any dependent is under the age of sixteen years at the time of the occurrence of the injury, the payment to such dependent shall cease when such dependent shall reach the age of sixteen years. The payment to any dependent shall cease if and when, under the same circumstances, the necessity creating the dependency would have ceased if the injury had not happened.

If the workman is under the age of twenty-one years and unmarried at the time of his death, the parents or parent of the workman shall receive $20.00 per month for each month after his death until the time at which he would have arrived at the age of twenty-one years.

(4) In the event a surviving spouse receiving monthly payment shall die, leaving a child or children under the age of sixteen years, the sum he or she shall be receiving on account of such child or children shall be thereafter, until such child shall arrive at the age of sixteen years, paid to the child increased 100 per cent, but the total to all children shall not exceed the sum of thirty-five dollars per month.

(b) Permanent total disability means the loss of both legs or both arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the workman from performing any work at any gainful occupation.

When permanent total disability results from the injury the workman shall receive monthly during the period of such disability:

(1) If unmarried at the time of the injury, the sum of $20.00.

(2) If the workman have a wife or invalid husband, but no child under the age of sixteen years, the sum of $25.00. If the husband is not an invalid, the monthly payment of $25.00 shall be reduced to $15.00.

(3) If the workman have a wife or husband and a child or children under the age of sixteen years, or, being a widow or widower, have any such child or children, the monthly

payment provided in the preceding paragraph shall be increased by five dollars for each such child until such child shall arrive at the age of sixteen years, but the total monthly payment shall not exceed thirty-five dollars.

(c) If the injured workman die during the period of total disability, whatever the cause of death, leaving a widow, invalid widower or child under the age of sixteen years, the surviving widow or invalid widower shall receive twenty dollars per month until death or remarriage, to be increased five dollars per month for each child under the age of sixteen years, until such child shall arrive at the age of sixteen years; but if such child is or shall be without father or mother, such child shall receive ten dollars per month until arriving at the age of sixteen years. The total combined monthly payment under this paragraph shall in no case exceed thirty-five dollars. Upon remarriage the payments on account of a child or children shall continue as before to the child or children.

(d) When the total disability is only temporary, the schedule of payment contained in paragraphs (1), (2) and (3) of the foregoing subdivision (d) shall apply so long as the total disability shall continue, increased 50 per cent for the first six months of such continuance, but in no case shall the increase operate to make the monthly payment exceed sixty per cent of the monthly wage (the daily wage multiplied by twenty-six) the workman was receiving at the time of his injury. As soon as recovery is so complete that the present earning power of the workman, at any kind of work, is restored to that existing at the time of the occurrence of the injury the payments shall cease. If and so long as the present earning power is only partially restored the payments shall continue in the proportion which the new earning power shall bear to the old. No compensation shall be payable out of the accident fund unless the loss of earning power shall exceed five per cent.

(e) For every case of injury resulting in death or permanent total disability it shall be the duty of the department to forthwith notify the state treasurer, and he shall set

apart out of the accident fund a sum of money for the case, to be known as the estimated lump value of the monthly payments provided for it, to be calculated upon the theory that a monthly payment of twenty dollars, to a person thirty years of age, is equal to a lump sum payment, according to the expectancy of life as fixed by the American Mortality Table, of four thousand dollars, but the total in no case to exceed the sum of four thousand dollars. The state treasurer shall invest said sum at interest in the class of securities provided by law for the investment of the permanent school fund, and out of the same and its earnings shall be paid the monthly instalments and any lump sum payment then or thereafter arranged for the case. Any deficiency shall be made good out of, and any balance or overplus shall revert to the accident fund. The state treasurer shall keep accurate account of all such segregations of the accident fund, and may borrow from the main fund to meet monthly payments pending conversion into cash of any security, and in such case shall repay such temporary loan out of the cash realized from the security.

(f) Permanent partial disability means the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where ligaments are severed, or any other injury known in surgery to be permanent partial disability. For any permanent partial disability resulting from an injury, the workman shall receive compensation in a lump sum in an amount equal to the extent of the injury, to be decided in the first instance by the department, but not in any case to exceed the sum of $1,500.00. The loss of one major arm at or above the elbow shall be deemed the maximum permanent partial disability. Compensation for any other permanent partial disability shall be in the proportion which the extent of such disability shall bear to the said maximum. If the injured workman be under the age of twenty-one years and unmarried, the parents or parent shall also receive a lump sum payment equal to ten per cent. of the amount awarded the minor workman.

(g) Should a further accident occur to a workman already receiving a monthly payment under this section for a temporary disability, or who has been previously the recipient of a lump sum payment under this act, his future compensation shall be adjusted according to the other provisions of this section and with regard to the combined effect of his injuries, and his past receipt of money under this act.

(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for future application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payments.

(i) A husband or wife of an injured workman, living in a state of abandonment for more than one year at the time of the injury or subsequently, shall not be a beneficiary under this act.

(j) If a beneficiary shall reside or remove out of the state the department may, in its discretion, convert any monthly payments provided for such case into a lump sum payment (not in any case to exceed $4,000.00) upon the theory, according to the expectancy of life as fixed by the American Mortality Table, that a monthly payment of $20.00 to a person thirty years of age is worth $4,000.00, or, with the consent of the beneficiary, for a smaller sum.

(k) Any court review under this section shall be initiated in the county where the workman resides or resided at the time of the injury, or in which the injury occurred.

Sec. 6. *Intentional Injuries—Status of Minors*

If injury or death results to a workman from the deliberate intention of the workman himself to produce such injury or death, neither the workman nor the widow, widower, child or dependent of the workman shall receive any payment whatsoever out of the accident fund. If injury or death results to a

workman from the deliberate intention of his employer to produce such injury or death, the workman, the widow, widower, child, or dependent of the workman shall have the privilege to take under this act and also have cause of action against the employer, as if this act had not been enacted for any excess of damage over the amount received or receivable under this act.

A minor working at an age legally permitted under the laws of this state shall be deemed *sui juris* for the purpose of this act, and no other person shall have any cause of action or right to compensation for an injury to such minor workman except as expressly provided, in this act, but in the event of a lump sum payment becoming due under this act to such minor workman, the management of the sum shall be within the probate jurisdiction of the courts the same as other property of minors.

Sec. 7. *Conversion into Lump Sum Payment.*

In case of death or permanent total disability the monthly payment provided may be converted, in whole or in part, into a lump sum payment (not in any case to exceed $4,000.00), on the theory, according to the expectancy of life as fixed by the American Mortality Table, that a monthly payment of $20.00 to a person thirty years of age is worth the sum of $4,000.00, in which event the monthly payment shall cease in whole or in part accordingly or proportionately. Such conversion may only be made after the happening of the injury and upon the written application of the beneficiary (in case of minor children, the application may be by either parent) to the department, and shall rest in the discretion of the department. Within the rule aforesaid the amount and value of the lump sum payment may be agreed upon between the department and the beneficiary.

Sec. 8. *Defaulting Employers.*

If any employer shall default in any payment to the accident fund hereinbefore in this act required, the sum due shall be collected by action at law in the name of the state as plaintiff, and such right of action shall be in addition to any other right

of action or remedy. In respect to any injury happening to any of his workmen during the period of any default in the payment of any premium under section 4, the defaulting employer shall not, if such default be after demand for payment, be entitled to the benefits of this act, but shall be liable to suit by the injured workman (or the husband, wife, child or dependent of such workman in case death result from the accident), as he would have been prior to the passage of this act.

In case the recovery actually collected in such suit shall equal or exceed the compensation to which the plaintiff therein would be entitled under this act, the plaintiff shall not be paid anything out of the accident fund; if the said amount shall be less than such compensation under this act, the accident fund shall contribute the amount of the deficiency. The person so entitled under the provisions of this section to sue shall have the choice (to be exercised before suit) of proceeding by suit or taking under this act. If such person shall take under this act, the cause of action against the employer shall be assigned to the state for the benefit of the accident fund. In any suit brought upon such cause of action the defense of fellow servant and assumption of risk shall be inadmissible, and the doctrine of comparative negligence shall obtain. Any such cause of action assigned to the state may be prosecuted or compromised by the department in its discretion. Any compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department.

Sec. 9. *Employer's Responsibility for Safeguard.*

If any workman shall be injured because of the absence of any safeguard or protection required to be provided or maintained by, or pursuant to, any statue or ordinance, or any departmental regulation under any statute, or be, at the time of the injury, of less than the maximum age prescribed by law for the employment of a minor in the occupation in which he shall be engaged when injured, the employer shall, within ten days after demand therefor by the department, pay into the

accident fund, in addition to the same required by section 4 to be paid:

(a) In case the consequent payment to the workman out of the accident fund be a lump sum, a sum equal to 50 per cent of that amount.

(b) In case the consequent payment to the workman be payable in monthly payments, a sum equal to 50 per cent of the lump value of such monthly payment, estimated in accordance with the rule stated in section 7.

The foregoing provisions of this act shall not apply to the employer if the absence of such guard or protection be due to the removal thereof by the injured workman himself or with his knowledge by any of his fellow workmen, unless such removal be by order or direction of the employer or superintendent or foreman of the employer, or any one placed by the employer in control or direction of such workman. If the removal of such guard or protection be by the workman himself or with his consent by any of his fellow workmen, unless done by order or direction of the employer or the superintendent or foreman of the employer, or any one placed by the employer in control or direction of such workman, the schedule of compensation provided in section 5 shall be reduced 10 per cent for the individual case of such workman.

Sec. 10. *Exemption of Awards.*

No money paid or payable under this act out of the accident fund shall, prior to issuance and delivery of the warrant therefor, be capable of being assigned, charged, nor ever taken in execution or attached or garnisheed, nor shall the same pass to any other person by operation of law. Any such assignment or charge shall be void.

Sec. 11. *Non-Waiver of Act by Contract.*

No employer or workman shall exempt himself from the burden or waive the benefits of this act by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be *pro tanto* void.

Sec. 12. *Filing Claim for Compensation.*

(a) Where a workman is entitled to compensation under this act he shall file with the department, his application for such, together with the certificate of the physician who attended him, and it shall be the duty of the physician to inform the injured workman of his rights under this act and to lend all necessary assistance in making this application for compensation and such proof of other matters as required by the rules of the department without charge to the workman.

(b) Where death results from injury the parties entitled to compensation under this act, or some one in their behalf, shall make application for the same to the department, which application must be accompanied with proof of death and proof of relationship showing the parties to be entitled to compensation under this act, certificates of attending physician, if any, and such other proof as required by the rules of the department.

(c) If change of circumstance warrant an increase or rearrangement of compensation, like application shall be made therefor. No increase or rearrangement shall be operative for any period prior to application therefor.

(d) No application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred or the right thereto accrued.

Sec. 13. *Medical Examination.*

Any workman entitled to receive compensation under this act is required, if requested by the department, to submit himself for medical examination at a time and from time to time at a place reasonably convenient for the workman and as may be provided by the rules of the department. If the workman refuses to submit to any such examination, or obstructs the same, his rights to monthly payments shall be suspended until such examination has taken place, and no compensation shall be payable during or for account of such period.

Sec. 14. *Notice of Accident.*

Whenever any accident occurs to any workman it shall be the duty of the employer at once to report such accident and

the injury resulting therefrom to the department, and also to any local representative of the department. Such report shall state:

1. The time, cause and nature of the accident and injuries, and the probable duration of the injury resulting therefrom.

2. Whether the accident arose out of or in the course of the injured person's employment.

3. Any other matters the rules and regulations of the department may prescribe.

Sec. 15. *Inspection of Employer's Books.*

The books, records and pay rolls of the employer pertinent to the administration of this act shall always be open to inspection by the department or its traveling auditor, agent or assistant, for the purpose of ascertaining the correctness of the pay roll, the men employed, and such other information as may be necessary for the department and its management under this act. Refusal on the part of the employer to submit said books, records and pay rolls for such inspection to any member of the commission, or any assistant presenting written authority from the commission, shall subject the offending employer to a penalty of one hundred dollars for each offense, to be collected by civil action in the name of the state and paid into the accident fund, and the individual who shall personally give such refusal shall be guity of a misdemeanor.

Sec. 16. *Penalty for Misrepresentation as to Pay Roll.*

Any employer who shall misrepresent to the department the amount of pay roll upon which the premium under this act is based shall be liable to the state in ten times the amount of the difference in premium paid and the amount the employer should have paid. The liability to the state under this section shall be enforced in a civil action in the name of the state. All sums collected under this section shall be paid into the accident fund.

Sec. 17. *Public and Contract Work.*

Whenever the state, county or any municipal corporation shall engage in any extra hazardous work in which workmen

are employed for wages, this act shall be applicable thereto. The employer's payments into the accident fund shall be made from the treasury of the state, county or municipality. If said work is being done by contract, the pay roll of the contractor and the sub-contractor shall be the basis of computation, and in the case of contract work consuming less than one year in performance the required payment into the accident fund shall be based upon the total pay roll. The contractor and any sub-contractor shall be subject to the provisions of the act, and the state for its general fund, the county or municipal corporation shall be entitled to collect from the contractor the full amount payable to the accident fund, and the contractor, in turn shall be entitled to collect from the sub-contractor his proportionate amount of the payment. The provisions of this section shall apply to all extra hazardous work done by contract, except that in private work the contractor shall be responsible, primarily and directly, to the accident fund for the proper percentage of the total pay roll of the work and the owner of the property affected by the contract shall be surety for such payments. Whenever and so long as, by state law, city charter or municipal ordinance, provision is made for municipal employes injured in the course of employment, such employes shall not be entitled to the benefits of this act and shall not be included in the pay roll of the municipality under this act.

Sec. 18. *Interstate Commerce.*

The provisions of this act shall apply to employers and workmen engaged in intrastate and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that any such employer and any of his workmen working only in this state may, with the approval of the department, and so far as not forbidden by any act of Congress, voluntarily accept the provisions of this act by filing written acceptances

with the department. Such acceptances, when filed with and approved by the department, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms. Payment of premium shall be on the basis of the payroll of the workmen who accept as aforesaid.

Sec. 19. *Elective Adoption of Act.*

Any employer and his employes engaged in works not extra hazardous may, by their joint election, filed with the department, accept the provisions of this act, and such acceptances, when approved by the department, shall subject them irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms. Ninety per cent of the minimum rate specified in section 4 shall be applicable to such case until otherwise provided by law.

Sec. 20. *Court Review.*

Any employer, workman, beneficiary, or person feeling aggrieved at any decision of the department affecting his interests under this act may have the same reviewed by a proceeding for that purpose, in the nature of an appeal, initiated in the superior court of the county of his residence (except as otherwise provided in subdivision [1] of section numbered 5) in so far as such decision rests upon questions of fact, or of the proper application of the provisions of this act, it being the intent that matters resting in the discretion of the department shall not be subject to review. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. No such appeal shall be entertained unless notice of appeal shall have been served by mail or personally upon some member of the commission within twenty days following the rendition of the decision appealed from and communication thereof to the person affected thereby. No bond shall be required, except that on appeal by the employer from a decision of the department under section 9 shall be ineffectual unless, within five days following the service of notice thereof, a bond, with surety satisfactory to the court, shall be filed, conditioned to

perform the judgment of the court. Except in the case last named an appeal shall not be a stay. The calling of a jury shall rest in the discretion of the court except that in cases arising under sections 9, 15 and 16 either party shall be entitled to a jury trial upon demand. It shall be unlawful for any attorney engaged in any such appeal to charge or receive any fees therein in excess of a reasonable fee, to be fixed by the court in the case, and, if the decision of the department shall be reversed or modified, such fee and the fees of medical and other witnesses and the costs shall be payable out of the administration fund, if the accident fund is affected by the litigation. In other respects the practice in civil cases shall apply. Appeal shall lie from the judgment of the superior court as in other civil cases. The attorney general shall be the legal adviser of the department and shall represent it in all proceedings, whenever so requested by any of the commissioners. In all court proceedings under or pursuant to this act the decision of the department shall be *prima facie* correct, and the burden of proof shall be upon the party attacking the same.

Sec. 21. *Creation of Department.*

The administration of this act is imposed upon a department, to be known as the Industrial Insurance Department, to consist of three commissioners to be appointed by the governor. One of them shall hold office for the first two years, another for the first four years, and another for the first six years following the passage and approval of this act. Thereafter the term shall be six years. Each commisioner shall hold until his successor shall be appointed and shall have qualified. A decision of any question arising under this act concurred in by two of the commissioners shall be the decision of the department. The governor may at any time remove any commissioner from office in his discretion, but within ten days following any such removal the governor shall file in the office of the secretary of state a statement of his reasons therefor. The commission shall select one of their members as chairman. The main office of the commission shall be at the state capitol, but

branch offices may be established at other places in the state. Each member of the commission shall have power to issue subpoenas requiring the attendance of witnesses and the production of books and documents.

Sec. 22. *Salary of Commissioners.*

The salary of each of the commissioners shall be thirty-six hundred dollars per annum, and he shall be allowed his actual and necessary traveling and incidental expenses; and any assistant to the commissioners shall be paid for each full day's service rendered by him, his actual and necessary traveling expenses and such compensation as the commission may deem proper, not to exceed six dollars per day to an auditor, or five dollars per day to any other assistant.

Sec. 23. *Deputies and Assistants.*

The commissioners may appoint a sufficient number of auditors and assistants to aid them in the administration of this act, at an expense not to exceed $5,000.00 per month. They may employ one or more physicians in each county for the purpose of official medical examinations, whose compensation shall be limited to five dollars for each examination and report therein. They may procure such record books as they may deem necessary for the record of the financial transactions and statistical data of the department, and the necessary documents, forms and blanks. They may establish and require all employers to install and maintain an uniform form of pay roll.

Sec. 24. *Conduct, Management and Supervision of Department.*

The commission shall, in accordance with the provisions of this act:

1. Establish and promulgate rules governing the administration of this act.

2. Ascertain and establish the amounts to be paid into and out of the accident fund.

3. Regulate the proof of accident and extent thereof, the proof of death and the proof of relationship and the extent of dependency.

4. Supervise the medical, surgical and hospital treatment to the intent that same may be in all cases suitable and wholesome.

5. Issue proper receipts for moneys received, and certificates for benefits accrued and accruing.

6. Investigate the cause of all serious injuries and report to the governor from time to time any violations or laxity in performance of protective statutes or regulations coming under the observation of the department.

7. Compile and preserve statistics showing the number of accidents occurring in the establishment or works of each employer, the liabilities and expenditures of the accident fund on account of, and the premium collected from the same, and hospital charges and expenses.

8. Make annual reports to the governor (one of them not more than sixty nor less than thirty days prior to each regular session of the legislature) of the workings of the department, and showing the financial status and the outstanding obligations of the accident fund, and the statistics aforesaid.

Sec. 25. *Medical Witnesses.*

Upon the appeal of any workman from any decision of the department affecting the extent of his injuries or the progress of the same, the court may appoint not to exceed three physicians to examine the physical condition of the appellant, who shall make to the court their report thereon, and they may be interrogated before the court by or on behalf of the appellant in relation to the same. The fee of each shall be fixed by the court, but shall not exceed ten dollars per day each.

Sec. 26. *Disbursement of Funds.*

Disbursement out of the funds shall be made only upon warrants drawn by the state auditor upon vouchers therefor transmitted to him by the department and audited by him. The state treasurer shall pay every warrant out of the fund

upon which it is drawn. If, at any time, there shall not be sufficient money in the fund on which any such warrant shall have been drawn wherewith to pay the same, the employer on account of whose workman it was that the warrant was drawn shall pay the same, and he shall be credited upon his next following contribution to such fund the amount so paid with interest thereon at the legal rate from the date of such payment to the date such next following contribution became payable, and if the amount of the credit shall exceed the amount of the contribution, he shall have a warrant upon the same fund for the excess, and if any such warrant shall not be so paid, it shall remain, nevertheless, payable out of the fund. The state treasurer shall to such extent as shall appear to him to be advisable keep the moneys of the unsegregated portion of the accident fund invested at interest in the class of securities provided by law for the investment of the permanent school fund. The state treasurer shall be liable on his official bond for the safe custody of the moneys and securities of the accident fund, but all the provisions of an act approved February 21, 1907, entitled "An act to provide for state depositories and to regulate the deposits of state moneys therein," shall be applied to said moneys and the handling thereof by the state treasurer.

Sec. 27. *Test of Invalidity of Act.*

If any employer shall be adjudicated to be outside the lawful scope of this act, the act shall not apply to him or his workmen, or if any workman shall be adjudicated to be outside the lawful scope of this act because of remoteness of his work from the hazard of his employer's work, any such adjudication shall not impair the validity of this act in other respects, and in every such case an accounting in accordance with the justice of the case shall be had of moneys received. If the provisions of section 4 of this act for the creation of the accident fund, or the provisions of this act making the compensation to the workman provided in it exclusive of any other remedy on the part of the workman shall be held invalid the entire act shall be thereby invalidiated except the pro-

visions of section 31, and an accounting according to the justice of the case shall be had of moneys received. In other respects an adjudication of invalidity of any part of this act shall not affect the validity of the act as a whole or any other part thereof.

Sec. 28. *Statute of Limitations Saved.*

If the provisions of this act relative to compensation for injuries to or death of workmen become invalid because of any adjudication, or be repealed, the period intervening between the occurrence of an injury or death, not previously compensated for under this act by lump payment or completed monthly payments, and such repeal or the rendition of the final adjudication of the invalidity shall not be computed as a part of the time limited by law for the commencement of any action relating to such injury or death: Provided, That such action be commenced within one year after such repeal or adjudication; but in any such action any sum paid out of the accident fund to the workman on account of injury, to whom the action is prosecuted, shall be taken into account or disposed of as follows: If the defendant employer shall have paid without delinquency into the accident fund the payment provided by section 4, such sums shall be credited upon the recovery as payment thereon, otherwise the sum shall not be so credited but shall be deducted from the sum collected and be paid into the said fund from which they had been previously disbursed.

Sec. 29. *Appropriations.*

There is hereby appropriated out of the state treasury the sum of one hundred and fifty thousand dollars, or so much thereof as may be necessary, to be known as the administration fund, out of which the salaries, traveling and office expenses of the department shall be paid, and also all other expenses of the administration of the accident fund; and there is hereby appropriated out of the accident fund for the purpose to which said fund is applicable the sum of $1,500,000.00, or so much thereof as shall be necessary for the purposes of this act.

Sec. 30. *Safeguard Regulations preserved.*

Nothing in this act contained shall repeal any existing law providing for the installation or maintenance of any device, means or method for the prevention of accidents in extra hazardous work or for penalty or punishment, for failure to install or maintain any such protective device, means or method, but sections 8, 9, and 10 of the act approved March 6, 1905, entitled: "An act providing for the protection and health of employes in factories, mills or workshops, where machinery is used, and providing for suits to recover damages sustained by the violation thereof, and prescribing a punishment for the violation thereof and repealing an act entitled 'An act providing for the protection of employes in factories, mills, or workshops where machinery is used, and providing for the punishment of the violation thereof, approved March 6, 1903.' and repealing all other acts or parts of acts in conflict herewith," are hereby repealed, except as to any cause of action which shall have accrued thereunder prior to October 1, 1911.

Sec. 31. *Distribution of Funds in Case of Repeal.*

If this act shall be hereafter repealed, all moneys which are in the accident fund at the time of the repeal shall be subject to such disposition as may be provided by the legislature, and in default of such legislative provision distribution thereof shall be in accordance with the justice of the matter, due regard being had to obligations of compensation incurred and existing.

Sec. 32. *Saving Clause.*

This act shall not affect any action pending or cause of action existing on the 30th day of September, 1911.

Passed the House February 23, 1911.

Passed the Senate March 7, 1911.

Approved by the Governor March 14, 1911.

MOUNTAIN TIMBER COMPANY *v.* STATE OF WASHINGTON.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 13. Argued March 1, 2, 1916; restored to docket for reargument November 13, 1916; reargued January 30, 1917.—Decided March 6, 1917.

The Washington Workmen's Compensation Act, as originally enacted, Laws 1911, c. 74, establishes a state fund for the compensation of workmen injured, and the dependents of workmen killed, in employments classed as hazardous; abolishes, except in a few specified cases, the action at law by employee against employer for damages due to negligence, and deprives the courts of jurisdiction over such controversies. It is obligatory upon both employers and employees. The fund is made the sole source of compensation, and is supplied by assessments upon each employer of definite percentages of his total

pay-roll. It classifies industries in groups, and aims to adjust the percentage for each group, according to hazard, declaring this the most accurate and equitable method and promising future readjustments by the legislature of both classification and percentages to fit experience. The contributions of each group form a separate account or sub-fund, applicable to no other demands for compensation than those arising in the industries composing that group. Contributions, after the first, are not to exceed what is necessary to meet actual losses in the group for which they are exacted. The act expressly saves all actions and causes existing when it took effect, as between employers and employees, some months after its passage.

Held: (1) The act not being valid against employers if not valid as against employees, an employer may question its constitutionality in both aspects.

(2) Viewed from the standpoint of employees, the act is the same in principle as the act sustained in *New York Central R. R. Co.* v. *White*, *ante*, 188.

(3) The act is not objectionable upon the ground that, in violation of the Seventh Amendment, it does away with trial by jury in the federal courts, since it does not undertake to interfere with that mode of trial in respect of private rights of action which are preserved, but abolishes for the future all right of recovery as between employer and employee in the cases which it covers, leaving nothing for trial by jury either in the state or in the federal courts.

(4) Taking effect *in futuro* and expressly preserving intervening causes of action, the act disturbs no vested rights.

(5) In requiring employers to make payments to the state fund for the compensation of injured employees and the dependents of those killed, without regard to fault, the act does not deprive employers of their property, or of their liberty to acquire it, in violation of the Fourteenth Amendment, provided the compensation be not excessive and unreasonable, and provided the burden be fairly distributed among the employers included in the industries affected.

(6) In the absence of any showing to the contrary, the compensation provided by the act may be regarded as not unreasonable; this is not to say, however, that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable; any question of that kind may be met when it arises.

(7) As for the scheme for distributing the burden among employers, the method of applying percentages to pay-rolls, in view of the legislative declaration of its accuracy and fairness, cannot be deemed arbitrary if the percentages be fair; and although in this act the percentages seem high, it is plain that, as to each group of industries,

the assessments, after the initial payments, will be limited to the amounts necessary to meet the losses arising in and chargeable to that group.

(8) The declarations of the act should be accepted as further evidence of an intelligent effort to limit the burden to the requirements of each industry.

(9) Since the question whether a state law deprives of a right secured by the Constitution depends not upon how the law is characterized but upon its practical operation and effect, and since the Constitution does not require a separate exercise of the state powers of regulation and taxation, the crucial question is whether this legislation, be it regarded as an exercise of the power of regulation, or a combination of regulation and taxation, clearly appears to be not a fair and reasonable exertion of governmental power but so extravagant or arbitrary as to constitute abuse of power.

A State in the exercise of its power to pass such legislation as reasonably is deemed necessary to promote the health, safety and general welfare of its people, may regulate the carrying on of all those industrial occupations that frequently and inevitably produce personal injuries and disability with consequent loss of earning power among employees, and occasional loss of life of those upon whom others are dependent for support, and may require that these human losses be charged against the industry, either directly, or by publicly administering the compensation and distributing the cost among the industries affected by means of a reasonable system of occupation taxes.

In the absence of any particular showing of erroneous classification, the evident purpose of an act to classify various occupations according to the respective hazard of each is sufficient answer to any contention that the act improperly distributes the burdens among the several industries.

One who is engaged in the business of logging timber, operating a logging railroad, and operating a saw-mill with power-driven machinery, is not in a position to question the validity of a classification of other businesses as hazardous.

The provision in § 4 of the Washington Workmen's Compensation Law making it a misdemeanor for any employer to deduct any part of the premium from the wages or earnings of his employees will not be construed, in the absence of any constraining state construction, so broadly as to prohibit employers and employees, in agreeing upon terms of employment, from taking into consideration the fact that the employer is a contributor to the state fund and the resulting effect of the act upon the rights of the parties.

Quære: Whether, if so construed, the act would not be objectionable as an unconstitutional interference with the freedom of contract.

Whether the constitutional guaranty of republican form of government (Art. IV, § 4) has been violated, is not a judicial question, but a political question addressed to Congress.

75 Washington, 581, affirmed.

THE case is stated in the opinion.

Mr. F. Markoe Rivinus and *Mr. Theodore W. Reath*, with whom *Mr. Edmund C. Strode* and *Mr. Coy Burnett* were on the briefs, for plaintiff in error:

The act is sought to be supported upon the grounds that the present system thrusts the burden upon those who are economically weakest, makes recoveries difficult, exposes employers to excessive verdicts, wastes the insurance which it provides for employees, produces antagonism between employer and employee, and subjects society to economic loss. The theory of the law, as of its German prototype, is a theory of economic improvement at the expense of the employer. It does not create or conserve rights of members of society as individuals. No alteration is intended in the contractual relations between employer and employee in the way of regulating the physical performance of the duties which the relations involve, by prescribing rules of conduct and fixing liability for non-observance. The object is rather to use the relationship created by the contracts of the parties to aid as a basis for raising between them a new and independent contract of insurance to serve this economic policy.

The law of tort, including employers' liability statutes, pertains to the redress of private wrongs. The damages recoverable are intended to be commensurate with and to reimburse the employee for the injury suffered. But the obligations of workmen's compensation accrue from contingencies not within the control of the parties and thus have no relation to their conduct; the compensation is

not intended to be commensurate with the injury but is based upon some percentage of the employee's wages.

The objects of this legislation may suffice for the legislative power of Germany, but are not a legislative basis accordant with constitutional restraints. There is grave danger in good intentions; Webster's Speeches, National ed., 1903, p. 207; and foreign experience shows that from "accident" through "occupational diseases" and their "*sequelæ*," this system leads to the insurance of sickness and of unemployment, and ultimately to old-age pensions, until no duty of thrift or foresight is left to the workman or employer. The policy points clean beyond the relation of master and servant to the inclusion of all misfortune.

The Fourteenth Amendment was adopted to preclude such philanthropic interference with the liberty of a self-reliant race. If the centralized advantages of communism or socialism are deemed preferable, the Constitution provides a method of amendment resulting in certainty of right. The idea, so often suggested, that somehow constitutional restraints stand as a barrier to modern progress is based on a one-sided view. The choice is not a choice of the supposed advantages of socialism and the defects of individualism but of the advantages and defects considered together of these two great conceptions. But that choice may not be made or sanctioned by this court for the nation. The question here is, has the Constitution limited the state legislatures so as to preclude this legislation and the socialistic conception of governmental function upon which it is based? We shall not be able to answer by any considerations of mere economic policy.

In the present instance the legislature lays the ground for this so-called exercise of the police power by a finding that substantially all of the industrial operations in the State are "extra hazardous." By no intelligible definition or understanding of the words "extra hazardous" can this finding be true. All occupations are in some degree haz-

ardous. Life is hazardous. Demonstrably many of the industries named in the law are not extra hazardous as compared with agricultural or domestic occupations. Statistically, agriculture, for example, proves one of the most hazardous of all occupations, more hazardous than railroading. Yet farming is omitted from the act. The legislature cannot say that which is either obviously impossible or demonstrably untrue, and having said it be above judicial review and constitutional restraint. *Lochner* v. *New York*, 198 U. S. 45; *Muller* v. *Oregon*, 208 U. S. 420. There can be no permanence and stability in the fundamental concepts of government if the courts may abandon the attempt to define the limits of police power as impossible and then justify, upon legislative fiat, a law against constitutional objection as an exercise of that power. In *Lochner* v. *New York*, *supra*, this court realized and faced its difficult duty in this regard. That was a difficult case owing to a conflict of evidence as to hazard. But the principle of the case, that legislative fiat cannot make hazard if none exists, is changeless and established by all authority in this court. The Washington law, in substantially all the callings of industrial life, by such a fiat, attempts to deprive the employer and employee of liberty of contract by requiring the employer to insure his employee against industrial accident and the employee to surrender his other rights. The law includes bakeries under "working in food stuffs," also "creameries"—in short, substantially all industrial occupations.

Compensation laws are based on a socialistic, economic theory. That theory has no relation to hazard. The farm-hand or domestic servant who breaks his arm at work is from the economic view-point as much entitled to compensation and state support as the industrial worker. And such was the German and English experience, where the compensation scheme was of necessity finally extended to all employments irrespective of hazard. The essay on

hazard which constitutes the introduction of the Washington law is for the purpose of meeting constitutional objection to a socialistic scheme; but hazard as a ground of the law is embarrassing in the execution of the economic policy. For we find hazard put forward in justification of the law, but stretched beyond judicial recognition. Hazard is put forward to meet constitutional objection; while the conflicting economic theory, which must disregard hazard, is put forward to justify the law under the police power.

The law cannot be justified as special taxation upon employers to compensate employees for injuries incurred in employment. In this aspect the taxing power is invoked to execute an economic theory rather than to raise revenue. See Cooley on Taxation, p. 1125. And so the problem is not changed, for the law must still be a legitimate exercise of the police power. The problem of restraints, then, is not simplified by reference to the taxing power; it is further complicated by consideration of a superadded set of restraints,—those appropriate to the taxing power.

Taxation must always be according to constitutional restraints. Economic theory cannot alone justify its exercise. Economic advantage may inhere in or result from a particular tax scheme but this is incidental, and not the constitutional justification of the scheme. If economic advantage would justify the taking of property for some purpose benign in itself, we should see the end of constitutional restraints upon the taxing power. The power to levy taxes must be exercised in furtherance of some public purpose. *Savings & Loan Association* v. *Topeka*, 20 Wall. 655.

The purpose of this law is not public. The object is to impose the ordinary risks of the employees' industrial life upon the employer alone. The considerations of policy advanced in support of this legislaton could not

confine its scope to the risks of industrial life. Every casualty which might cause distress, such as sickness, unemployment or old age, would equally justify and (as history has shown) require a state grant of the employer's money. *Chicago* v. *Sturges*, 222 U. S. 313, distinguished.

The cases supporting special assessments depend on compensatory benefits. *Hammett* v. *Philadelphia*, 65 Pa. St. 146, 157. Substitution of liability in all cases for liability in tort for negligence is not such a benefit. The purpose of the law is not confined to the poor and the indigent, and hence is not for the maintenance of public charity. *Weismer* v. *Village of Douglas*, 64 N. Y. 91; *Ohio & Mississippi Ry. Co.* v. *Lackey*, 78 Illinois, 55; *Ives* v. *South Buffalo Ry.*, 201 N. Y. 271, 320.

The act takes the employer's property without legal reason, invades his and his employee's right of private contract in a matter with which the public has no concern, by introducing a term of industrial insurance, and is not due process or equal protection required by the Fourteenth Amendment. *Bank* v. *Okley*, 4 Wheat. 244; Webster's argument in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 581; *Oregon Railroad & Navigation Co.* v. *Fairchild*, 224 U. S. 510, 524, 525.

St. Louis & San Francisco Ry. Co. v. *Mathews*, 165 U. S. 1; *Heeg* v. *Licht*, 80 N. Y. 579; *Rylands* v. *Fletcher*, L. R., 3 H. L. 330; *Actiesselskabet Ingrid* v. *Central R. Co. of New Jersey*, 216 Fed. Rep. 72, and similar cases involved laws concerning injuries resulting from dangerous agencies; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, a voluntary compensation law; *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, a law forbidding contracts against public policy; *Chicago, Rock Island & Pacific Ry. Co.* v. *Zernecke*, 183 U. S. 582, and *Noble State Bank* v. *Haskell*, 219 U. S. 104, business affected by public interest.

The "prevailing morality" referred to by Mr. Justice

Holmes in the *Haskell Case* does not mean the transient opinion of a majority. Such a construction of the word "prevailing" "would justify any legislation, if only supported by a sufficient popular demand." *Ives* v. *South Buffalo Ry.*, *supra*, p. 319. Mr. Justice Holmes used the word "prevailing" in the sense of predominant for all time and was alluding, in general terms, to moral precepts which are axiomatic. *Jensen* v. *Southern Pacific Co.*, 215 N. Y. 514, was an erroneous interpretation of the decision of this court in the *Haskell Case*, *supra*, the New York court failing to distinguish between private business and business, like banking, which is of direct public concern. *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186, relates to carriers, and *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor*, 210 U. S. 281, to a law creating a substantive duty of care. *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36, is no authority for the arbitrary classification of substantially all industrial businesses under one head as extra hazardous.

Mr. W. V. Tanner, Attorney General of the State of Washington, for defendant in error.

Mr. Justice Pitney delivered the opinion of the court.

This was an action brought by the State against plaintiff in error, a corporation engaged in the business of logging timber and operating a logging railroad and a sawmill having power-driven machinery, all in the State of Washington, to recover under c. 74 of the Laws of 1911, known as the Workmen's Compensation Act, certain premiums based upon a percentage of the estimated pay-roll of the workmen employed by plaintiff in error during the three months beginning October 1, 1911. Plaintiff in error by demurrer raised objections to the act based upon the Constitution of the United States.

The Supreme Court of Washington overruled them, and affirmed a judgment in favor of the State, 75 Washington, 581, following its previous decision in *State, ex rel. Davis-Smith Co.* v. *Clausen*, 65 Washington, 156; and the case comes here under § 237, Judicial Code.

The act establishes a state fund for the compensation of workmen injured in hazardous employment, abolishes, except in a few specified cases, the action at law by employee against employer to recover damages on the ground of negligence, and deprives the courts of jurisdiction over such controversies. It is obligatory upon both employers and employees in the hazardous employments, and the state fund is maintained by compulsory contributions from employers in such industries, and is made the sole source of compensation for injured employees and for the dependents of those whose injuries result in death. We will recite its provisions to an extent sufficient to show the character of the legislation.

The first section contains a declaration of policy, reciting that the common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions, and in practice proves to be economically unwise and unfair; that the remedy of the workman has been uncertain, slow and inadequate; that injuries in such employments, formerly occasional, have become frequent and inevitable; and that the welfare of the State depends upon its industries, and even more upon the welfare of its wage-workers. "The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this

act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

The second section, declaring that while there is a hazard in all employment, certain employments are recognized as being inherently constantly dangerous, enumerates those intended to be embraced within the term "extra hazardous," including factories, mills and workshops where machinery is used, printing, electrotyping, photo-engraving and stereotyping plants where machinery is used; foundries, blast furnaces, mines, wells, gas works, water works, reduction works, breweries, elevators, wharves, docks, dredges, smelters, powder works; logging, lumbering, and shipbuilding operations; logging, street and interurban railroads; steamboats, railroads, and a number of others; at the same time declaring that if there be or arise any extra hazardous occupation not enumerated, it shall come under the act, and its rate of contribution to the accident fund shall be fixed by the Department created by the act upon the basis of the relation which the risk involved bears to the risks classified, until the rate shall be fixed by legislation. The third section contains a definition of terms, and, among them, "Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant, or, he being in the course of his employment, away from the plant of his employer;" with a proviso giving to a workman injured while away from the plant through the negligence or wrong of another not in the same employ, or, if death result from the injury, to his widow, children, or dependents, an election whether to take under the act or to seek a remedy against the third party. "Injury"

is defined as an injury resulting from some fortuitous event, as distinguished from the contraction of disease.

Section 4 contains a schedule of contribution, reciting that industry should bear the greater portion of the burden of the cost of its accidents, and requiring each employer prior to January 15th of each year to pay into the state treasury, in accordance with the schedule, a sum equal to a percentage of his total pay-roll for the year, "the same being deemed the most accurate method of equitable distribution of burden in proportion to relative hazard." The application of the act as between employers and workmen is made to date from the first day of October, 1911, the payment for that year to be made prior to that date and upon the basis of the pay-roll of the last preceding three months of operation. At the end of each year an adjustment of accounts is to be made upon the basis of the actual pay-roll. The schedule divides the various occupations into groups, and imposes various percentages upon the different groups, the lowest being 1½%, in the case of the textile industries, creameries, printing establishments, etc., and the highest being 10%, in the case of powder works. The same section establishes 47 different classes of industry, and declares:

"For the purpose of such payments accounts shall be kept with each industry in accordance with the classification herein provided and no class shall be liable for the depletion of the accident fund from accidents happening in any other class. Each class shall meet and be liable for the accidents occurring in such class. There shall be collected from each class as an initial payment into the accident fund as above specified on or before the 1st day of October, 1911, one-fourth of the premium of the next succeeding year, and one-twelfth thereof at the close of each month after December, 1911: Provided, Any class having sufficient funds credited to its account at the end of the first three months or any month thereafter, to meet

the requirements of the accident fund, that class shall not be called upon for such month. In case of accidents occurring in such class after lapsed payment or payments said class shall pay the said lapsed or deferred payments commencing at the first lapsed payment, as may be necessary to meet such requirements of the accident fund. The fund thereby created shall be termed the 'accident fund' which shall be devoted exclusively to the purpose specified for it in this act. *In that the intent is that the fund created under this section shall ultimately become neither more nor less than self-supporting, exclusive of the expense of administration, the rates in this section named are subject to future adjustment by the legislature, and the classifications to rearrangement following any relative increase or decrease of hazard shown by experience.*[1] . . . If, after this act shall have come into operation, it is shown by experience under the act, because of poor or careless management, any establishment or work is unduly dangerous in comparison with other like establishments or works, the department may advance its classification of risks and premium rates in proportion to the undue hazard. In accordance with the same principle, any such increase in classification or premium rate, shall be subject to restoration to the schedule rate. . . . If, at the end of any

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[1] By Sess. Laws 1915, c. 188, p. 674, 677, § 4 was amended so as to substitute in the place of the clause italicised the following: "In that the intent is that the fund created under this section shall ultimately become neither more nor less than self-supporting, exclusive of the expense of administration, the rates named in this section are subject to future adjustment by the industrial insurance department, in accordance with any relative increase or decrease in hazard shown by experience, and if in the judgment of the industrial insurance department the moneys paid into the fund of any class or classes shall be insufficient to properly and sufficiently distribute the burden of expense of accidents occurring therein, the department may divide, rearrange or consolidate such class or classes, making such adjustment or transfer of funds as it may deem proper."

year, it shall be seen that the contribution to the accident fund by any class of industry shall be less than the drain upon the fund on account of that class, the deficiency shall be made good to the fund on the 1st day of February of the following year by the employers of that class in proportion to their respective payments for the past year."

Section 5 contains a schedule of the compensation to be awarded out of the accident fund to each injured workman, or to his family or dependents in case of his death, and declares that except as in the act otherwise provided such payment shall be in lieu of any and all rights of action against any person whomsoever. Where death results from the injury, the compensation includes the expenses of burial, not exceeding $75 in any case, a monthly payment of $20 for the widow or invalid widower, to cease at remarriage, and $5 per month for each child under the age of 16 years until that age is reached, but not exceeding $35 in all, with a lump sum of $240 to a widow upon her remarriage; if the workman leaves no wife or husband, but a child or children under the age of 16 years, there is to be a monthly payment of $10 to each child until that age is reached, but not exceeding a total of $35 per month; if there be no widow, widower, or child under the age of 16 years, other dependent relatives are to receive monthly payments equal to 50% of the average monthly support actually received by such dependent from the workman during the twelve months next preceding his injury, but not exceeding a total of $20 per month. For permanent total disability of a workman, he is to receive if unmarried $20, or, if married, $25 per month, with $5 per month additional for each child under the age of 16 years, but not exceeding $35 per month in all. (Section 7 provides that the monthly payment, in case of death or permanent total disability, may be converted into a lump sum payment, not in any case exceeding $4,000, according to the expect-

ancy of life.) For temporary total disability there is a somewhat different scale, compensation to cease when earning power is restored. For permanent partial disability the workman is to receive compensation in a lump sum equal to the extent of the injury, but not exceeding $1,500.

By § 6, if injury or death results to a workman from his deliberate intention to produce it, neither he nor his widow, child, or dependents shall receive any payment out of the fund. If injury or death results to a workman from the deliberate intention of the employer to produce it, the workman or his widow, child, or dependent shall have the privilege to take under the act, and also have a cause of action against the employer for any excess of damage over the amount receivable under the act.

By § 19 provision is made for the adoption of the act by the joint election of any employer and his employees engaged in works not extra hazardous. By § 21 the Industrial Insurance Department is created, consisting of three commissioners. By § 20 a judicial review is given in the nature of an appeal to the Superior Court from any decision of the Department upon questions of fact or of the proper application of the act, but not upon matters resting in the discretion of the Department. Other sections provide for matters of detail, and § 11 renders void any agreement by employer or workman to waive the benefit of the act.

From this recital it will be clear that the fundamental purpose of the act is to abolish private rights of action for damages to employees in the hazardous industries (and in any other industry at the option of employer and employees), and to substitute a system of compensation to injured workmen and their dependents out of a public fund established and maintained by contributions required to be made by the employers in proportion to the hazard of each class of occupation.

While plaintiff in error is an employer, and cannot succeed without showing that its constitutional rights as employer are infringed (*Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576), yet it is evident that the employer's exemption from liability to private action is an essential part of the legislative scheme and the *quid pro quo* for the burdens imposed upon him, so that if the act is not valid as against employees it is not valid as against employers.

However, so far as the interests of employees and their dependents are concerned, this act is not distinguishable in any point raising a constitutional difficulty from the New York Workmen's Compensation Act, sustained in *New York Central R. R. Co.* v. *White*, decided this day, *ante*, 188. It is true that in the Washington Act the state fund is the sole source from which the compensation shall be paid, whereas the New York Act gives to the employer an option to secure the compensation either through state insurance, insurance with an authorized insurance corporation, or by a deposit of securities with the state commission. But we find here no ground for a distinction unfavorable to the Washington law.

So far as employers are concerned, however, there is a marked difference between the two laws, because of the enforced contributions to the state fund that are characteristic of the Washington Act, and it is upon this feature that the principal stress of the argument for plaintiff in error is laid.

Two of the constitutional objections may be disposed of briefly. It is urged that the law violates § 4 of Article IV of the Constitution of the United States, guaranteeing to every State in the Union a republican form of government. As has been decided repeatedly, the question whether this guaranty has been violated is not a judicial but a political question, committed to Congress and not to the courts. *Luther* v. *Borden*, 7 How. 1, 39, 42; *Pacific*

States Telephone & Telegraph Co. v. *Oregon*, 223 U. S. 118; *Kiernan* v. *Portland, Oregon*, 223 U. S. 151; *Marshall* v. *Dye*, 231 U. S. 250, 256; *Davis* v. *Ohio*, 241 U. S. 565.

The Seventh Amendment, with its provision for preserving the right of trial by jury, is invoked. It is conceded that this has no reference to proceedings in the state courts (*Minneapolis &. St. Louis R. R. Co.* v. *Bombolis*, 241 U. S. 211, 217), but it is urged that the question is material for the reason that if the act be constitutional it must be followed in the federal courts in cases that are within its provisions. So far as private rights of action are preserved, this is no doubt true; but with respect to those we find nothing in the act that excludes a trial by jury. As between employee and employer, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury.

The only serious question is that which is raised under the "due process of law" and "equal protection" clauses of the Fourteenth Amendment. It is contended that since the act unconditionally requires employers in the enumerated occupations to make payments to a fund for the benefit of employees, without regard to any wrongful act of the employer, he is deprived of his property, and of his liberty to acquire property, without compensation and without due process of law. It is pointed out that the occupations covered include many that are private in their character, as well as others that are subject to regulation as public employments, and it is argued that with respect to private occupations (including those of plaintiff in error) a compulsory compensation act does not concern the interests of the public generally, but only the particular interests of the employees, and is unduly oppressive upon employers and arbitrarily interferes with and restricts the management of private business operations.

The statute, although approved March 14, 1911, took effect as between employers and workmen on October 1

in that year, actions pending and causes of action existing on September 30 being expressly saved. It therefore disturbed no vested rights, its effect being confined to regulating the relation of employer and employee in the hazardous occupations *in futuro*.

If the legislation could be regarded merely as substituting one form of employer's liability for another, the points raised against it would be answered sufficiently by our opinion in *New York Central R. R. Co.* v. *White*, *supra*, where it is pointed out that the common-law rule confining the employer's liability to cases of negligence on his part or on the part of others for whose conduct he is made answerable, the immunity from responsibility to an employee for the negligence of a fellow employee, and the defenses of contributory negligence and assumed risk, are rules of law that are not beyond alteration by legislation in the public interest; that the employer has no vested interest in them nor any constitutional right to insist that they shall remain unchanged for his benefit; and that the States are not prevented by the Fourteenth Amendment, while relieving employers from liability for damages measured by common-law standards and payable in cases where they or others for whose conduct they are answerable are found to be at fault, from requiring them to contribute reasonable amounts and according to a reasonable and definite scale by way of compensation for the loss of earning power arising from accidental injuries to their employees, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall, that is, upon particular injured employees and their dependents.

But the Washington law goes further, in that the enforced contributions of the employer are to be made whether injuries have befallen his own employees or not, so that however prudently one may manage his business, even to the point of immunity to his employees from acci-

dental injury or death, he nevertheless is required to make periodical contributions to a fund for making compensation to the injured employees of his perhaps negligent competitors.

In the present case the Supreme Court of Washington (75 Washington, 581, 583), sustained the law as a legitimate exercise of the police power, referring at the same time to its previous decision in the *Clausen Case*, 65 Washington, 156, 203, 207, which was rested principally upon that power, but also (pp. 203, 207), sustained the charges imposed upon employers engaged in the specified industries as possessing the character of a license tax upon the occupation, partaking of the dual nature of a tax for revenue and a tax for purposes of regulation. We are not here concerned with any mere question of construction, nor with any distinction between the police and the taxing powers. The question whether a state law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized, but upon its practical operation and effect. *Henderson* v. *Mayor of New York*, 92 U. S. 259, 268; *Stockard* v. *Morgan*, 185 U. S. 27, 36; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217, 227; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 28, 30; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146, 162; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 362. And the Federal Constitution does not require a separate exercise by the States of their powers of regulation and of taxation. *Gundling* v. *Chicago*, 177 U. S. 183, 189.

Whether this legislation be regarded as a mere exercise of the power of regulation, or as a combination of regulation and taxation, the crucial inquiry under the Fourteenth Amendment is whether it clearly appears to be not a fair and reasonable exertion of governmental power, but so extravagant or arbitrary as to constitute an abuse of power. All reasonable presumptions are in favor of

its validity, and the burden of proof and argument is upon those who seek to overthrow it. *Erie R. R. Co.* v. *Williams*, 233 U. S. 685, 699. In the present case it will be proper to consider: (1) Whether the main object of the legislation is, or reasonably may be deemed to be, of general and public moment, rather than of private and particular interest, so as to furnish a just occasion for such interference with personal liberty and the right of acquiring property as necessarily must result from carrying it into effect. (2) Whether the charges imposed upon employers are reasonable in amount, or, on the other hand, so burdensome as to be manifestly oppressive. And (3) whether the burden is fairly distributed, having regard to the causes that give rise to the need for the legislation.

As to the first point: The authority of the States to enact such laws as reasonably are deemed to be necessary to promote the health, safety, and general welfare of their people, carries with it a wide range of judgment and discretion as to what matters are of sufficiently general importance to be subjected to state regulation and administration. *Lawton* v. *Steele*, 152 U. S. 133, 136. "The police power of a State is as broad and plenary as its taxing power." *Kidd* v. *Pearson*, 128 U. S. 1, 26. In *Barbier* v. *Connolly*, 113 U. S. 27, 31, the court, by Mr. Justice Field, said: "Neither the [fourteenth] amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—

for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." It seems to us that the considerations to which we have adverted in *New York Central R. R. Co.* v. *White, supra*, as showing that the Workmen's Compensation Law of New York is not to be deemed arbitrary and unreasonable from the standpoint of natural justice, are sufficient to support the State of Washington in concluding that the matter of compensation for accidental injuries with resulting loss of life or earning capacity of men employed in hazardous occupations is of sufficient public moment to justify making the entire matter of compensation a public concern, to be administered through state agencies. Certainly the operation of industrial establishments that in the ordinary course of things frequently and inevitably produce disabling or mortal injuries to the human beings employed is not a matter of wholly private concern. It hardly would be questioned that the State might expend public moneys to provide hospital treatment, artificial limbs, or other like aid to persons injured in industry, and homes or support for the widows and orphans of those killed. Does direct compensation stand on a less secure ground? A

familiar exercise of state power is the grant of pensions to disabled soldiers and to the widows and dependents of those killed in war. Such legislation usually is justified as fulfilling a moral obligation or as tending to encourage the performance of the public duty of defense. But is the State powerless to compensate, with pensions or otherwise, those who are disabled, or the dependents of those whose lives are lost, in the industrial occupations that are so necessary to develop the resources and add to the wealth and prosperity of the State? A machine as well as a bullet may produce a wound, and the disabling effect may be the same. In a recent case, the Supreme Court of Washington said: "Under our statute the workman is the soldier of organized industry accepting a kind of pension in exchange for absolute insurance on his master's premises." *Stertz* v. *Industrial Insurance Commission*, 91 Washington, 588, 606. It is said that the compensation or pension under this law is not confined to those who are left without means of support. This is true. But is the State powerless to succor the wounded except they be reduced to the last extremity? Is it debarred from compensating an injured man until his own resources are first exhausted? This would be to discriminate against the thrifty and in favor of the improvident. The power and discretion of the State are not thus circumscribed by the Fourteenth Amendment.

Secondly, is the tax or imposition so clearly excessive as to be a deprivation of liberty or property without due process of law? If not warranted by any just occasion, the least imposition is oppressive. But that point is covered by what has been said. Taking the law, therefore, to be justified by the public nature of the object, whether as a tax or as a regulation, the question whether the charges are excessive remains. Upon this point no particular contention is made that the compensation allowed is unduly large; and it is evident that unless it be

so the corresponding burden upon the industry cannot be regarded as excessive if the State is at liberty to impose the entire burden upon the industry. With respect to the scale of compensation, we repeat what we have said in *New York Central R. R. Co.* v. *White*, that in sustaining the law we do not intend to say that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable, and that any question of that kind may be met when it arises.

Upon the third question—the distribution of the burden—there is no criticism upon the act in its details. As we have seen, its fourth section prescribes the schedule of contribution, dividing the various occupations into groups, and imposing various percentages evidently intended to be proportioned to the hazard of the occupations in the respective groups. Certainly the application of a proper percentage to the pay-roll of the industry cannot be deemed an arbitrary adjustment, in view of the legislative declaration that it is "deemed the most accurate method of equitable distribution of burden in proportion to relative hazard." It is a matter of common knowledge that in the practice of insurers the pay-roll frequently is adopted as the basis for computing the premium. The percentages seem to be high; but when these are taken in connection with the provisions requiring accounts to be kept with each industry in accordance with the classification, and declaring that no class shall be liable for the depletion of the accident fund from accidents happening in any other class, and that any class having sufficient funds to its credit at the end of the first three months or any month thereafter is not to be called upon, it is plain that, after the initial payment, which may be regarded as a temporary reserve, the assessments will be limited to the amounts necessary to meet actual losses. As further rebutting the suggestion that the imposition is exorbitant or arbitrary, we should accept the declaration of intent that

the fund shall ultimately become neither more nor less than self-supporting, and that the rates are subject to future adjustment by the legislature and the classifications to rearrangement according to experience, as plain evidence of an intelligent effort to limit the burden to the requirements of each industry.

We may conveniently answer at this point the objection that the act goes too far in classifying as hazardous large numbers of occupations that are not in their nature hazardous. It might be sufficient to say that this is no concern of plaintiff in error, since it is not contended that its businesses of logging timber, operating a logging railroad, and operating a sawmill with power-driven machinery, or either of them, are non-hazardous. *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544. But further, the question whether any of the industries enumerated in § 4 is non-hazardous will be proved by experience, and the provisions of the act themselves give sufficient assurance that if in any industry there be no accident there will be no assessment, unless for expenses of administration. It is true that, while the section as originally enacted provided for advancing the classification of risks and premium rates in a particular establishment shown by experience to be unduly dangerous because of poor or careless management, there was no corresponding provision for reducing a particular industry shown by experience to be included in a class which imposed upon it too high a rate. This was remedied by the amendment of 1915, quoted in the margin, above, which, however, cannot affect the decision of the present case. But in the absence of any particular showing of erroneous classification—and there is none—the evident purpose of the original act to classify the various occupations according to the respective hazard of each is sufficient answer to any contention of improper distribution of the burden amongst the industries themselves.

There remains, therefore, only the contention that it is inconsistent with the due process and equal protection clauses of the Fourteenth Amendment to impose the entire cost of accident loss upon the industries in which the losses arise. But if, as the legislature of Washington has declared in the first section of the act, injuries in such employments have become frequent and inevitable, and if, as we have held in *New York Central R. R. Co.* v. *White*, the State is at liberty, notwithstanding the Fourteenth Amendment, to disregard questions of fault in arranging a system of compensation for such injuries, we are unable to discern any ground in natural justice or fundamental right that prevents the State from imposing the entire burden upon the industries that occasion the losses. The act in effect puts these hazardous occupations in the category of dangerous agencies, and requires that the losses shall be reckoned as a part of the cost of the industry, just like the pay-roll, the repair account, or any other item of cost. The plan of assessment insurance is closely followed, and none more just has been suggested as a means of distributing the risk and burden of losses that inevitably must occur, in spite of any care that may be taken to prevent them.

We are clearly of the opinion that a State, in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety, and general welfare of its people, may regulate the carrying on of industrial occupations that frequently and inevitably produce personal injuries and disability with consequent loss of earning power among the men and women employed, and, occasionally, loss of life of those who have wives and children or other relations dependent upon them for support, and may require that these human losses shall be charged against the industry, either directly, as is done in the case of the act sustained in *New York Central R. R. Co.* v. *White, supra*, or by publicly adminis-

tering the compensation and distributing the cost among the industries affected by means of a reasonable system of occupation taxes. The act cannot be deemed oppressive to any class of occupation, provided the scale of compensation is reasonable, unless the loss of human life and limb is found in experience to be so great that if charged to the industry it leaves no sufficient margin for reasonable profits. But certainly, if any industry involves so great a human wastage as to leave no fair profit beyond it, the State is at liberty, in the interest of the safety and welfare of its people, to prohibit such an industry altogether.

To the criticism that carefully managed plants are in effect required to contribute to make good the losses arising through the negligence of their competitors, it is sufficient to say that the act recognizes that no management, however careful, can afford immunity from personal injuries to employees in the hazardous occupations, and prescribes that negligence is not to be determinative of the question of the responsibility of the employer or the industry. Taking the fact that accidental injuries are inevitable, in connection with the impossibility of foreseeing when, or in what particular plant or industry they will occur, we deem that the State acted within its power in declaring that no employer should conduct such an industry without making stated and fairly apportioned contributions adequate to maintain a public fund for indemnifying injured employees and the dependents of those killed, irrespective of the particular plant in which the accident might happen to occur. In short, it cannot be deemed arbitrary or unreasonable for the State, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plant or work, to impose the burden upon the industry through a system of occupation taxes limited to the actual losses occurring in the respective classes of occupation.

The idea of special excise taxes for regulation and rev-

enue proportioned to the special injury attributable to the activities taxed is not novel. In *Noble State Bank* v. *Haskell*, 219 U. S. 104, this court sustained an Oklahoma statute which levied upon every bank existing under the laws of the State an assessment of a percentage of the bank's average deposits, for the purpose of creating a guaranty fund to make good the losses of depositors in insolvent banks. There, as here, the collection and distribution of the fund were made a matter of public administration, and the fund was created not by general taxation but by a special imposition in the nature of an occupation tax upon all banks existing under the laws of the State. In *Hendrick* v. *Maryland*, 235 U. S. 610, 622, and *Kane* v. *New Jersey*, 242 U. S. 160, 169, we sustained laws, of a kind now familiar, imposing license fees upon motor vehicles, graduated according to horse power, so as to secure compensation for the use of improved roadways from a class of users for whose needs they are essential and whose operations over them are peculiarly injurious. And see *Charlotte, Columbia & Augusta R. R. Co.* v. *Gibbes*, 142 U. S. 386, 394–5, and cases cited. Many of the States have laws protecting the sheep industry by imposing a tax upon dogs in order to create a fund for the remuneration of sheep-owners for losses suffered by the killing of their sheep by dogs. And the tax is imposed upon all dog-owners, without regard to the question whether their particular dogs are responsible for the loss of sheep. Statutes of this character have been sustained by the state courts against attacks based on constitutional grounds. *Morey* v. *Brown*, 42 N. H. 373, 375; *Tenney, Chairman*, v. *Lenz*, 16 Wisconsin, 566; *Mitchell* v. *Williams*, 27 Indiana, 62; *Van Horn* v. *People*, 46 Michigan, 183, 185, 186; *Longyear* v. *Buck*, 83 Michigan, 236, 240; *Cole* v. *Hall, Collector*, 103 Illinois, 30; *Holst* v. *Roe*, 39 Ohio St. 340, 344; *McGlone, Sheriff*, v. *Womack*, 129 Kentucky, 274, 283 *et seq.*

We are unable to find that the act, in its general features, is in conflict with the Fourteenth Amendment. Numerous objections are urged, founded upon matters of detail, but they call for no particular mention, either because they are plainly devoid of merit, are covered by what we have said, or are not such as may be raised by plaintiff in error.

Perhaps a word should be said respecting a clause in § 4 which reads as follows: "It shall be unlawful for the employer to deduct or obtain (*sic*) any part of the premium required by this section to be by him paid from the wages or earnings of his workmen or any of them, and the making or attempt to make any such deductions shall be a gross misdemeanor." If this were to be construed so broadly as to prohibit employers and employees, in agreeing upon wages and other terms of employment, from taking into consideration the fact that the employer was a contributor to the state fund, and the resulting effect of the act upon the rights of the parties, it would be open to serious question whether as thus construed it did not interfere to an unconstitutional extent with their freedom of contract. So far as we are aware the clause has not been so construed, and on familiar principles we will not assume in advance that a construction will be adopted such as to bring the law into conflict with the Federal Constitution. *Bachtel* v. *Wilson*, 204 U. S. 36, 40; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 546.

Judgment affirmed.

THE CHIEF JUSTICE, MR. JUSTICE MCKENNA, MR. JUSTICE VAN DEVANTER and MR. JUSTICE MCREYNOLDS dissent.